Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6316

ANDREW C. GOOSBY, ET AL.,

Petitioners,

—v.—

MAURICE OSSER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Docket entries of the District Court	1
Docket entries of the Court of Appeals	3
Petition for leave to proceed in forma pauperis and order of Judge Troutman granting, dated, October 6, 1971	7
Complaint filed October 6, 1971 and Exhibits thereto	9
Motion for temporary restraining order filed October 6, 1971	62
Motion for preliminary injunction filed October 6, 1971	70
Motion to convene three judge District Court filed October 7, 1971	78
Partial transcript of the oral opinion of Troutman, J., filed October 7, 1971	81

INDEX

	Page
Order of the District Court, filed October 7, 1971	87
Opinion of the Court of Appeals, filed October 26, 1971	88
Judgment of the Court of Appeals filed October 26, 1971	92
Order of the Court of Appeals amending the slip opinion of October 26, 1971, filed November 11, 1971	93
Opinion of the Court of Appeals on the Petition for rehearing with separate dissent by Circuit Judge Adams filed December 17, 1971	94
Judgment of the Court of Appeals filed December 27, 1971	98
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	99

DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DATE	PROCEEDINGS
1971	
October 4	Petition to proceed in forma pauperis, filed.
October 6	Order that Petition to proceed in forma pauperis is GRANTED, etc. filed.
October 6	Complaint filed.
October 6	Summons exit.
October 6	Plfs' Motion for Temporary Restraining Order, affidavit in support thereof and notice thereon filed.
October 6	Plfs' Motion for Preliminary Injunction, affidavit in support thereof filed.
October 6	Stipulation that service of summons and complaint as to defts. J. Shane Creamer and C. Dolores Tucker and Commonwealth of Penna. is waived and that service is accepted by their counsel, filed.
October 6	Stipulation that Service of Summons and complaint as to defts. Maurice S. Osser, Frank Patterson, Louis Menna, Edward G. Mekel, Jack Welsh, Registration Commission for the City of Phila., and Edward J. Henddricks is waived, and that service is accepted by their counsel, filed.
October 6	HEARING: re Temporary restraining order—Complaint dismissed.
October 6	Order that complaint is dismissed, in open Court, filed. (10-8-71 entered and copies mailed)

DATE	PROCEEDINGS
1971	
October 7	Order that plff's complaint in the above captioned matter is dismissed with prejudice, filed. (10-12-71 entered and copies mailed)
October 7	Plff's memorandum of law in support of convening a three Judge Court, filed.
October 7	Plff's brief in support of motion for temporary restraining order, filed.
October 7	Plff's motion for three judge Court, filed.
October 7	Partial transcript of 10-6-71, filed.
October 7	Notice of appeal of plff., filed.
October 7	Copy of Clerk's Notice to U.S. Court of Appeals. (Copy to Judge Troutman)
October 14	Record transmitted to U.S. Court of Appeals.
October 13	Certified copy of Order, U.S. Court of Appeals, dated 10-8-71, granting an expedited hearing in the above entitled case, listing the appeal for argument during the week or 10-18-71, and denying the motion for injunction pending appeal, filed.
November 19	Transcript of 10-6-71, filed.
November 19	Certified copy of Order, U.S. Court of Appeals, that request of Appellee, Common- of Penna., for leave to file petition for rehearing en banc out of time is DENIED, filed.
December 28	Certified copy of judgment in lieu of formal mandate received from U.S.C.A. affirming judgment of this Court entered 10/7/71, filed.
December 28	Record on Appeal Returned.

DOCKET ENTRIES OF THE COURT OF APPEALS

DATE	FILINGS—PROCEEDINGS
1971	
October 7	(Certified copy of Order dated October 6, 1971 by Judge Troutman, U.S.D.J. granting plaintiffs-appellants leave to proceed in forma pauperis)
	Certified copy of Noticeof Appeal rec'd from counsel for appellants, filed.
	Motion by appellants for expedited hearing, filed. (4 copies)
	Motion by appellants for convening a three judge District Court and for Injunction Pending appeal, filed. (4 copies)
	Appearance of Jonathan A. Stein; Esquire; Ann Torregrossa, Esquire and Joseph A. Torregrossa, Esquire for appellant, filed.
October 8	Appellants' brief in support of motion for injunction pending appeal, rec'd. (4 copies)
	Heard on appellants motion for expedited hearing and appellants motion for injunction pending appeal. Coram: Kalodner, Staley and Adams, Circuit Judges.
	Order (*Kalodner*, Staley and Adams, Circuit Judges) granting motion for expedited hearing and listing the appeal for argument the week of October 18, 1971 and denying motion for injunction pending appeal, filed.
	Certified copy of above order to Clerk of District Court.

DATE	FILINGS—PROCEEDINGS
1971	
October 12	Order (Clerk) directing that appellants legible typewritten brief be hand filed and hand served not later than Tuesday, October 12, 1971; that appellees legible typewritten brief be hand filed and hand served not later than Friday, October 15, 1971; and that appellants' legible typewritten reply brief, if any, be filed and hand served not later than Monday, October 18, 1971, filed.
	Brief for appellants, filed. Certificate of Service attached. (7 copies)
October 13	Copy of Notice of Appeal rec'd from the Clerk of the District Court, filed.
October 14	Appearance of Barry A. Roth, Esquire for appellee, filed.
October 15	Record, received and filed.
October 15	Brief for appellees, received and filed. (4 copies). Proof of service by hand delivery on October 15, 1971 appears on page 29 of brief.
October 15	Brief for the Commonwealth, received and filed. (6 copies). Certificate of service by mail on October 15, 1971 appears on last page of brief.
October 18	Reply brief for appellants, received and filed. (7 copies). Certificate of service by mail on October 18, 1971 appears on page 6 of brief.
October 19	Supplemental brief for appellees, received for the information of the Court. (copies). Proof of service in letter dated October 18, 1971.
October 19	Letter, dated October 18, 1971, from Harry Wolov, Esquire counsel for appellees requesting permission to submit supplemental brief, received and filed.

DATE	FILINGS—PROCEEDINGS
1971	
October 19	Letter, dated October 19, 1971, from Joseph A. Torregrossa, Esquire counsel for appellant objecting to the filing of appellees' supplemental brief, filed.
October 26	Opinion Per Curiam. (*Aldisert*, Gibbons and Rosenn, Circuit Judges) filed.
October 26	Judgment affirming the order of the District Court, filed October 7, 1971 which dismissed the complaint. Costs taxed against appellants, filed.
October 21	Submitted on briefs. Coram: Aldisert, Gibbons and Rosenn, Circuit Judges.
November 9	Petition by appellants for rehearing in banc, received and filed. (16 copies). Certificate of service attached.
November 11	Order (*Aldisert*, Gibbons and Rosenn, Circuit Judges) amending the slip opinion filed October 26, 1971 as follows: (1) the last five lines of the second paragraph on page 4 are deleted and the following substituted therefor: "as amended by the Act of August 14, 1963, P.L. 900, 25 PURD. STAT. ANNO. § 623-1 et seq., and Pennsylvania Election Code, Act of 1937, P.L. 1333, Art. I, Sec. 102, as amended by the Act of August 13, 1963, P.L. 707, 25 PURD. STAT. ANNO. § 2602(w)(12), offend the equal protection clause and are therefore unconstitutional. The former statute regulates voting registration; the latter defines 'qualified absentee elector'. (2) The first line on page 5 is deleted and the following substituted therefor: "immediate adjudication, we have limited our opinion"., filed.

DATE	FILINGS—PROCEEDINGS
1971	
November 19	Order (Aldisert and *Rosenn*, Circuit Judges) denying oral request of counsel for appellee, Commonwealth of Pennsylvania, leave to file petition for rehearing en banc out of time, filed.
November 19	Certified copy of above order to Clerk of District Court.
December 17	Per Curiam Opinion on Petition for rehearing and order (Seitz, Chief Judge and Van Dusen, *Aldisert*, Adams, Gibbons, Rosenn, Rosen and Hunter, Circuit Judges with separate dissent by Judge *Adams*) denying the petition for rehearing, filed. Judges Van Dusen, Adams and Rosenn would grant the petition for rehearing.
December 27	Certified copies of the order amending the opinion and order on petition for rehearing to Clerk of District Court.
December 27	Certified judgment in lieu of formal mandate issued.
December 27	Record returned to Clerk of District Court.
December 29	Receipt for record received from Clerk of District Court, filed.
1972	
March 15	Notice of filing on March 10, 1972 of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S.C. No. 71-6316)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action-
Class Action

No. 71-

[Filed Oct. 4, 1971, John J. Harding, Clerk, U. S. District Court]

ANDREW C. GOOSBY, ET AL.

vs.

MAURICE OSSER, ET AL.

PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 28, U.S.C. § 1915, plaintiffs petition this Court for leave to commence and prosecute this action in forma pauperis without prepayment of fees and costs or security therefor because, as their attached affidavit indicates, they are unable to pay such costs or give security therefor.

/s/ Ann S. Torregrossa
ANN S. TORREGROSSA, ESQUIRE

/s/ Joseph A. Torregrossa
JOSEPH A. TORREGROSSA, ESQUIRE

/s/ Jonathanin Stein
JONATHANIN STEIN, ESQUIRE

/s/ Harvey N. Schmidt
HARVEY N. SCHMIDT, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action-
Class Action

No. 71-2380

ANDREW C. GOOSBY, ET AL.

vs.

MAURICE OSSER, ET AL.

ORDER

AND NOW, this 6th day of October 1971, upon petition and affidavit of plaintiffs for leave to proceed in forma pauperis, it is ORDERED that the petition be and hereby is GRANTED and that plaintiffs may commence and prosecute the above-titled action without prepayment of fees and costs or security therefor.

/s/ E. Mac Troutman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action-
Class Action

No. 71-2380

ANDREW C. GOOSBY,
Holmesburg Prison
Philadelphia, Pa. and

THEODORE Y. GUMBY,
Holmesburg Prison
Philadelphia, Pa. and

ERIC V. JOHNSON,
Holmesburg Prison
Philadelphia, Pa. and

ARCHIE T. JONES,
Holmesburg Prison
Philadelphia, Pa. and

CARL S. LANE,
Holmesburg Prison
Philadelphia, Pa. and

MICHAEL MITCHELL,
Holmesburg Prison
Philadelphia, Pa. and

CURTIS WILLIAMS,
Holmesburg Prison
Philadelphia, Pa. and

DAVID CASPER,
Holmesburg Prison
Philadelphia, Pa. and

ROBERT SIMMONS,
Holmesburg Prison
Philadelphia, Pa. and

BOBBY STOCKTON,
Holmesburg Prison
Philadelphia, Pa. and

NATHANIEL NELSON,
Holmesburg Prison
Philadelphia, Pa. and

HUGH WILLIAMS,
Holmesburg Prison
Philadelphia, Pa.,
PLAINTIFFS

on behalf of themselves and
all others similarly situated

vs.

MAURICE S. OSSER, City Commissioner
City Hall Annex
Philadelphia, Pa. and

FRANK PATTERSON, City Commissioner
City Hall Annex
Philadelphia, Pa. and

LOUIS MENNA, City Commissioner
City Hall Annex
Philadelphia, Pa. and

EDWARD G. MEKEL, Deputy Commissioner
City Hall Annex
Philadelphia, Pa. and

JACK WELSH, Voting Registration Supervisor
City Hall Annex
Philadelphia, Pa.

REGISTRATION COMMISSION FOR THE CITY OF PHILADELPHIA
City Hall Annex
Philadelphia, Pa. and

COMMONWEALTH OF PENNSYLVANIA

and

J. SHANE CREAMER, Attorney General
Commonwealth of Pennsylvania
Harrisburg, Pa. and

C. DELORES TUCKER, Secretary of the Commonwealth
Commonwealth of Pennsylvania
Harrisburg, Pa. and

EDWARD J. HENDRICKS
Superintendent of Prisons for Philadelphia County

COMPLAINT—CLASS ACTION

1. This is a proceeding for a declaratory judgment, temporary restraining order, preliminary and permanent injunction on the ground that the Pennsylvania Election Laws, First Class City Permanent Registration Act of March 30, 1937, P.L. 115 as amended, 25 Purdon's Statutes §§ 623-1 et seq. and Pennsylvania Election Code, Act of 1937, P.L. 1333, Art. I, Sec. 102, as amended by Act of August 13, 1963, P.L. 707, § 1, 25 Purdon's Statutes § 2602 (w) (12), is unconstitutional on its face and is being applied unconstitutionally by defendants, thus depriving plaintiffs and members of the class they represent who are unconvicted detainees in Philadelphia County prisons of the right to register and to vote in Philadelphia County.

2. The plaintiffs have been denied their right to equal protection and due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution, their right to political expression and redress of grievances as guaranteed by the First and Fourteenth Amendments of the United States Constitution, their right to be free from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution, and their right to vote in violation of Article I, Section 2 of the United States Constitution.

3. The plaintiffs allege that the defendants, acting individually and or in concert under color of law, have

been applying to members of the class different standards, practices and procedures to determine qualified voters in violation of 42 U.S.C. § 1971(a)(2)(A) ("Voting Rights Act of 1965").

4. This is a suit in equity authorized by 42 U.S.C. § 1983, to redress deprivation under color of law of rights, privileges and immunities secured by the United States Constitution. Monetary damages are inadequate and the plaintiffs and members of the class they represent have suffered and continue to suffer irreparable injury as a result of the application of the statutory provisions challenged herein. Accordingly, injunctive relief is necessary.

JURISDICTION

5. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 in that the matter in controversy exceeds $10,000 and arises under the Constitution and laws of the United States, and pursuant to 28 U.S.C. § 1343 (3) and (4), § 2201 and § 2202.

PARTIES

6. Plaintiff Andrew C. Goosby is thirty-four years of age, a United States citizen and has lived at 2663 Wolf Street, Philadelphia, Pennsylvania for the eight years preceding his arrest. He intends to return to this residence upon his release and would have returned to that address if he could afford bail. He has been awaiting trial since May 29, 1971 and his bail is set at $10,000. He is presently incarcerated at Holmesburg County Prison. He desires to register in the precinct where he resided prior to his arrest so that he may be able to vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

7. Plaintiff Theodore Y. Gumby is eighteen years of age, a United States citizen and has lived at 901 North 48th Street, Philadelphia, Pennsylvania for the sixteen months preceding his arrest. He intends to return to this residence upon his release and would have returned to this address if he could afford bail. He is presently

incarcerated in Holmesburg County Prison. He has been awaiting trial since his arrest on July 15, 1971 and his bail is set at $1,000. He desires to register in the precinct where he resided prior to his arrest so that he may be able to vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

8. Plaintiff Eric V. Johnson is twenty-one years of age, a United States citizen and has lived at 1333 Bainbridge Street, Philadelphia, Pennsylvania for fourteen years preceding his arrest. He intends to return to this residence upon his release and would have returned to this address if he could afford bail. He is presently incarcerated in Holmesburg County Prison. He has been awaiting trial since his arrest on May 12, 1971 and bail has been set at $1500. He desires to register in the precinct where he resided prior to his arrest so that he may be able to vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

9. Plaintiff Archie Jones is twenty-one years of age, a citizen of the United States and has lived at 5825 Cobbs Creek Parkway, Philadelphia, Pa., for four years preceding his arrest. He intends to return to this residence upon his release and would have returned to this address if he could afford bail. He is presently incarcerated in Holmesburg County Prison. He has been awaiting trial since his arrest on July 8, 1971 and bail has been set at $2500. He desires to register in the precinct where he resided prior to his arrest so that he may be able to vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

10. Plaintiff Carl Lane is 37 years of age, a United States citizen and has lived at 2233 Greenwich Street, Philadelphia, Pennsylvania for his entire life preceding his arrest. He intends to return to this residence upon his release and would have returned to this address if he could afford bail. He is presently incarcerated in Holmesburg County Prison. He has been awaiting trial since his arrest on June 2, 1971. Bail has been set at $6500. He desires to register in the precinct where he resided prior to his arrest so that he may be able to

vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

11. Plaintiff Michael Mitchell is twenty-two years of age, a United States citizen and has resided at 2525 W. Huntingdon Street, Philadelphia, Pennsylvania for four years preceding his arrest. He intends to return to this residence upon his release and would have returned to this residence if he could afford bail. He is presently incarcerated in Holmesburg County Prison. He has been awaiting trial since his arrest on May 8, 1971. Bail has been set at $10,000. He desires to register in the precinct where he resided prior to his arrest so that he may be able to vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

12. Plaintiff Curtis Williams is 25 years of age, a United States citizen and has resided at 4823 Hawthorne Street, Philadelphia, Pennsylvania for fourteen years preceding his arrest. He intends to return to this residence upon his release and would have returned if he could afford bail which has been set at $2,000. He is presently incarcerated in Holmesburg County Prison. He has been awaiting trial since his arrest on October 1970. He desires to register in the precinct where he resided prior to his arrest so that he may be able to vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

13. Plaintiff David Casper is 28 years of age, a United States citizen and has resided at 2436 Oxford Street, Philadelphia, Pennsylvania for four years preceding his arrest. He intends to return to this residence and would have returned if he could have bail set at an affordable level. His alleged offense is nonbailable. He is presently incarcerated in Holmesburg County Prison. He has been awaiting trial since his arrest on February of 1968. He desires to register in the precinct where he resided prior to his arrest so that he may be able to vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

14. Plaintiff Robert Simmons is twenty-one years of age, a United States citizen, and has resided at 49 North 52 Street, Philadelphia, Pennsylvania for seven months

prior to his arrest. His alleged offense is a nonbailable one. He is presently incarcerated in Holmesburg County Prison. He has been awaiting trial since his arrest on May 18, 1971. He desires to register in the precinct where he resided prior to his arrest so that he may be able to vote on November 2, 1971 and in all future elections, federal, state and local in his precinct and ward.

15. Plaintiff Bobby Stockton is currently registered to vote in Philadelphia County, Pennsylvania and is imprisoned in Holmesburg Prison awaiting trial because he cannot afford bail. He desires to vote in November 2, 1971 and in all future elections, federal, state and local.

16. Plaintiff Nathaniel Nelson is currently registered to vote in Philadelphia County, Pennsylvania, and is imprisoned in Holmesburg Prison awaiting trial because he cannot afford bail in the amount of $5700. He desires to vote on November 2, 1971 and in all future elections federal, state and local.

17. Plaintiff Hugh Williams is currently registered to vote in Philadelphia County, Pennsylvania and is imprisoned in Holmesburg Prison awaiting trial on a nonbailable offense. He desires to vote on November 2, 1971 and in all future elections federal, state and local.

18. Defendants Maurice S. Osser, Frank Patterson and Louis Menna are City Commissioners of Philadelphia, constituting the Board of Elections and the defendant Registration Commission of the city and county of Philadelphia. Pursuant to the Pennsylvania Election Code said Commissioners must register all persons qualified to vote in Philadelphia.

19. Defendant Edward G. Mekel is the Deputy City Commissioner of Philadelphia and is charged with the same duties as the Commissioners as enumerated above.

20. Defendant Jack Welsh is the Voting Registration Supervisor for the City and County of Philadelphia.

21. Defendants J. Shane Creamer, the Attorney General of the Commonwealth of Pennsylvania and C. Delores Tucker, the Secretary of the Commonwealth of Pennsylvania are duly appointed State officials mandated to enforce and administer the election laws of the Commonwealth of Pennsylvania.

22. Edward J. Hendricks, Superintendent of Prisons in and for the County of Philadelphia is empowered to superintend and administer: Holmesburg Prison, 8215 Torresdale, Avenue, Phila., Penn., Detention Center, 8201 State Road, Phila., Penna., and House of Correction, 8001 State Road, Phila.

CLASS ACTION ALLEGATIONS

23. Pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the plaintiffs bring this action in their own behalf and on behalf of all other untried inmates similarly situated. The class represented by the plaintiffs consists of all untried inmates incarcerated in Philadelphia County jails who possess the "qualifications of electors" in compliance with Pennsylvania Election Code, Act of June 3, 1937 P.L. 1333, Article III § 703, 1959, December 30, P.L. 2085, § 1, 25 PS § 2811, and who (a) have sought to register to vote or seek to register to vote in local, statewide and national elections in the County of Philadelphia and (b) are presently registered to vote or subsequently registered and who desire to vote on November 2, 1971 and in all future local, national and state elections. The approximate size of the class is in excess of 2,000. The members of the class are so numerous that joinder of all members is impracticable.

24. The questions of law and fact are common to the class, said questions being whether the plaintiffs and all those similarly situated are being unconstitutionally deprived of their right to register to vote and their right to vote as more fully set forth in paragraphs 60-69, *infra*.

25. The named plaintiffs will fairly and adequately represent the interests of the class in that plaintiffs either are charged with bailable offenses but cannot afford bail or are charged with non-bailable offenses, as more fully set forth in paragraphs 6 through 17, *supra*.

FACTS

26. Andrew C. Goosby, Theodore T. Gumby, Eric V. Johnson, Archie T. Jones, Carl S. Lane, Michael Mitchell,

Curtis Williams, David Cooper and Robert Simons (hereinafter called unregistered plaintiffs) possess all "qualifications of electors" in compliance with Pennsylvania Election Code, Act of June 3, 1937 P.L. 1333, Article III § 703, 1959, December 30, P.L. 2085, § 1, 25 P.S. § 2811.

27. The unregistered plaintiffs are charged with criminal offenses, are awaiting trial, and are incarcerated in Holmesburg Prison either because they cannot afford bail or because they are charged with non-bailable offenses.

28. The unregistered plaintiffs were incarcerated as specified in paragraph 27 above at the time registration was conducted.

29. During the period of registration, while incarcerated, the unregistered plaintiffs desired and continue to desire to be registered to vote in the November 2, 1971 election and all future local, state, and national elections.

30. During the period of registration while incarcerated unregistered plaintiffs could not physically appear before a registrar.

31. On September 8, 1971 J. Shore, a law clerk on the Staff of Community Legal Services asked Jack Welsh, Voting Registration Supervisor whether there were procedures to send registrars to the prison or allow registration by mail for untried pretrial detainees. Mr. Welsh stated that the Pennsylvania Election Laws would not permit such procedures.

32. Thereafter on September 8, 1971 J. Shore visited members of plaintiffs' class at Holmesburg County Prison for purposes of completing documents to formally request registration. Said documents required notarization and J. Shore was refused services of the prison notary for this purpose.

33. On September 13, 1971 within the time period for general registration, Ann S. Torregrossa, Esq. attempted to register seven members of plaintiff's class by presenting the following documents to three registrars:

a. A request by the applicant for himself and for all others similarly situated that a registrar be sent to the prisons as provided for in the case of physically disabled persons under 25 P.S. § 623-20(a).

b. A request by the applicant for himself and for all those similarly situated that registration be effected through the mail as provided for in the case of the military, the merchant marine, etc., under 25 P.S. § 623-20.2.

c. Affidavits which set forth all information required by these statutes, and setting forth all requirements of 25 Purdon's Statutes § 2811.

All three registrars refused to perform the registration and she was finally referred to E. G. Mekel, Deputy Commissioner, who was presented with the above documents. Copies of these documents are attached as Exhibits A-1 through A-7, and are incorporated herein.

34. Defendant E. G. Mekel refused to register the applicants and all others similarly situated either at that time, by mail, or by sending a registrar to the prisons. The reason given by Defendant Mekel for refusing to register the aforesaid individuals or any others was unless they appeared in person before a registrar or qualified as an absentee registrant, he had no authority to register them.

35. Upon refusal of E. G. Mekel to register the applicants and all those similarly situated, appeals were filed immediately pursuant to 25 P.S. § 623-25 with the City Commissioners. The statute requires that a hearing be scheduled within ten days. Copies of this appeal are attached as Exhibits B-1 through B-7 and incorporated herein.

36. When handed the appeals, Mr. Mekel stated that there was no right to appeal since there was no one present to be rejected. Therefore, he advised that Ann S. Torregrossa could leave the appeal forms and requests for registration or take them with her.

37. Notwithstanding this opinion a hearing was belatedly scheduled fifteen days later on September 28, 1971 before Defendants Osser, Patterson, and Menna.

38. Upon receiving notice of the hearing on September 22, 1971, Ann A. Torregrossa, Esq. requested that E. G. Mekel and Commissioner Osser issue subpoenas for the named individuals as they wished to attend the hearing. Defendants Mekel and Osser refused to issue

subpoenas stating they would make stipulations that would alleviate the necessity for their presence.

39. A writ of habeas corpus ad testificandum was filed on September 27, 1971 with the Honorable Judge Jamieson, Common Pleas Court to secure the presence of the named individuals at the hearing; the writ was denied on the ground that it would place too great a burden on the Sheriff's Department to bring the seven appellants to the hearing.

40. After public hearing on September 28, 1971, on the appeals, the Commissioners Osser, Menna, and Patterson denied the appeals, affirming the decision to deny registration to appellants and all those similarly situated, on the basis (1) that the law of Pennsylvania does not allow them to register the appellants and all those similarly situated while they are incarcerated and (2) that even if appellants and all those similarly situated were allowed to register to vote they would not be allowed to vote because they are not "qualified absentee electors" under 25 Purdon's Statutes § 2602(w)(12).

41. Thereafter Defendants Osser, Menna, and Patterson entered into a stipulation through Defendant E. G. Mekel, with Ann S. Torregrossa. A copy of the stipulation is attached hereto as Exhibit C and is incorporated herein.

42. Defendants Osser, Menna, and Patterson stated at the hearing that the cases of David Casper, Robert Simmons, and Hugh Williams or any other incarcerated person awaiting trial on nonbailable offenses, would have been decided on the same basis as were plaintiffs Goosby, Gumby, Johnson, Jones, Lane, Mitchell and Curtis Williams, as stated in paragraph 40, *supra.*

42a. Defendants Osser, Menna and Patterson stated at the hearing that all members of plaintiffs' class who are unregistered would have been denied registration on the same grounds as noted in paragraph 40, *supra.*

43. Plaintiffs Bobby Stockton, Nathaniel Nelson, and Hugh Williams (hereinafter called registered plaintiffs) are duly registered to vote in their respective districts in the November 2, 1971 election and all future federal, state, and local elections.

44. Registered plaintiffs are charged with criminal offenses, are awaiting trial, and are incarcerated in Holmesburg Prison either because they cannot afford bail or because they are charged with nonbailable offenses.

45. Registered plaintiffs desire to vote in the November 2, 1971 election and all future federal, state, and local elections.

46. Registered plaintiffs believe that they have no prospects of being released to vote on November 2, 1971, the election date, and believe that they will continue to be incarcerated as described in paragraph 43 *supra*.

47. Registered plaintiffs cannot physically appear to vote at a polling place on November 2, 1971.

48. The Pennsylvania Election Code 25 P.S. § 2602 (w) (12) specifically excludes registered plaintiffs from the class of qualified absentee electors.

49. Defendants Mekel and Osser stated at the hearing on September 28, 1971 that registered untried pretrial detainees would be denied an absentee ballot pursuant to 25 P.S. § 2602(w) (12).

50. Unregistered plaintiffs know of no existing state procedures, and there are no existing state procedures, which would have allowed them or anyone similarly situated to register to vote.

51. Registered plaintiffs know of no existing state procedures, and there are no existing state procedures, which would allow them or anyone in their class to vote on November 2, 1971, or in any other federal, state, or local election during their incarceration.

52. The Commonwealth of Pennsylvania has refused, upon petition, to establish procedures

(a) whereby unregistered plaintiffs and those similarly situated may register to vote; and

(b) whereby registered plaintiffs may exercise their right to vote.

53. The petition referred to above in paragraph 52 was made to defendant, Attorney General of Pennsylvania, J. Shane Creamer on behalf of plaintiffs and all those similarly situated by their attorneys Ann S. Tor-

regrossa, Esq. and Joseph A. Torregrossa, Esq. and by Allen Lawson.

54. Said petition recommended that the Commonwealth of Pennsylvania adopt one or more of the following procedures:

(a) that untried pre-trial detainees be registered either by sending registrars to the institutions where they are incarcerated at reasonable times with reasonable frequency and with reasonable notice, or by allowing them to register by mail; and

(b) that untried pre-trial detainees be allowed to vote either by bringing polling booths or paper ballots to the institutions where they are incarcerated, or by allowing them to go to the polling place in their district, or by absentee ballot.

55. Unregistered plaintiffs and their class are being absolutely denied of their right to register to vote because of the practices, policies, laws and procedures of defendants, acting under color of state law.

56. All plaintiffs and their class are absolutely denied their right to vote because of the practices, policies, laws and procedures of defendants, acting under color of state law.

57. Individuals who are charged with crimes but free on bail, who are convicted of a crime but on probation or parole, and individuals who fall within the provisions of 25 Purdon's Statutes §§ 623-20.2 or 20(a) or 20.3 are not denied the right to register to vote by defendants.

58. Individuals who are charged with crimes but free on bail, who are convicted but on probation or parole, and individuals who fall within the provisions of 25 Purdon's Statutes § 2602(w) are not denied the right to vote by defendants.

59. The laws, statutes, practices, policies and procedures of the Commonwealth of Pennsylvania, and specifically 25 Purdon's Statutes § 2602(w)(12) and 25 Purdon's Statutes §§ 621-1 et seq., deny plaintiffs and their class of their right to register to vote and their right to vote and are unconstitutional because, *inter alia*, (i) they preclude persons of limited means from voting,

tie the right to vote to the affluence of the voter and impose on unreasonable financial hardship on such persons as a precondition of their exercise of the franchise; (ii) they deny the right to register and vote for reasons which do not bear a reasonable relationship to any legitimate state interest in the conduct of elections, and (iii) they have the effect of denying persons the right to vote because of race or color.

FIRST CAUSE OF ACTION

60. Paragraphs 6-59 are realleged and incorporated herein.

61. The Pennsylvania election laws violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Voting Rights Act of 1965, 42 U.S.C. § 1971(A)(2)(A) because:

(a) As to members of plaintiffs' class who are incarcerated due to their inability to afford bail, the law draws an impermissible classification on the basis of the individual's wealth which cannot serve as a constitutional basis upon which to deny the fundamental right to register and to vote;

(b) As to all members of plaintiffs' class the law denies them equal protection of the laws by allowing and providing the ability for those who are physically unable to register and vote, such as those in the military and the disabled, to, in fact, register and vote, while denying these rights, without national purpose, to untried prisoners who because of confinement are physically unable to register and vote; and

(c) As to all members of plaintiffs' class the law establishes an invidious discrimination against untried detainees as against all other Pennsylvania citizens allowed to register and vote, such discrimination having no rational basis and being prohibited by the Fourteenth Amendment

(d) As to all members of plaintiffs' class, the law invidiously discrimintaes against plaintiffs and denies them the right to vote on the basis of race or color.

SECOND CAUSE OF ACTION

62. Paragraphs 6-59 are realleged and incorporated herein.

63. The Pennsylvania Election Laws deny all members of the plaintiffs' class their right to due process of law in violation of the Fourteenth Amendment to the United States Constitution in that by the denial of the fundamental constitutional right to register and vote it imposes an impermissible punishment upon those who have not been convicted.

THIRD CAUSE OF ACTION

64. Paragraphs 6-59 are realleged and incorporated herein.

65. The Pennsylvania Election Laws, by depriving members of plaintiffs' class the fundamental constitutional right to register and vote, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

FOURTH CAUSE OF ACTION

66. Paragraphs 6-59 are realleged and incorporated herein.

67. The Pennsylvania Election Laws by denying members of plaintiffs' class the right to register and vote deprives such members of their fundamental freedoms of speech, political expression and redress of grievances in violation of the First and Fourteenth Amendments to the United States Constitution.

FIFTH CAUSE OF ACTION

68. Paragraphs 6-59 are realleged and incorporated herein.

69. The Pennsylvania Election Laws deny all members of plaintiffs' class who are eligible or wish to vote in Federal elections, their right to vote in Federal elections and thereby violates Article I, Section 2 of the United States Constitution.

WHEREFORE, plaintiffs and their class respectfully pray that judgment be entered in their favor and against defendants:

(1) permanently enjoining defendants from refusing to register plaintiffs and all those similarly situated;

(2) ordering defendants to reopen the period of registration for a period of one week to enable plaintiffs and all those similarly situated to register to vote;

(3) ordering defendants to make registrars available at reasonable times, with reasonable frequency, and after reasonable notice, to plaintiffs and all those similarly situated at the institutions where plaintiffs and all those similarly situated are incarcerated;

(4) permanently enjoining defendants from denying to plaintiffs and all those similarly situated their right to vote;

(5) ordering defendants to issue absentee ballots to plaintiffs and all those similarly situated, who are registered to vote or who subsequently register, who request absentee ballots;

(6) ordering that defendants post a Notice in conspicuous places in the institutions where plaintiffs and all those similarly situated are incarcerated, the form of said Notice to be as the Court directs, advising plaintiffs and all those similarly situated of the availability of the above-ordered procedures for registering to vote and for voting;

(7) ordering that defendants pay the costs of this action and reasonable counsel fees.

/s/ _____

ANN S. TORREGROSSA, ESQ.
4053 Market St.
Philadelphia, Pa.

/s/ _____

JOSEPH A. TORREGROSSA, ESQ.
2107 Fidelity Building
Philadelphia, Pa.

/s/ _____

JONATHAN STEIN, ESQ.
313 S. Juniper St.
Philadelphia, Pa.

/s/ _____

HARVEY N. SCHMIDT, ESQ.
313 S. Juniper St.
Philadelphia, Pa.

Attorneys for Plaintiffs

EXHIBIT A-1

REQUEST FOR VOTORS' REGISTRATION

I, Andrew Coles Goosby, hereby request that you send a duly authorized Registrar or person authorized to act on his behalf to my present temporary address at Holmesberg Co. Prison since I am unable to appear in person, or register me according to the provisions of 25 P.S. § 623-20.2. To this extent I have enclosed all information required by this section as follows:

1. My name is Andrew Coles Goosby.
2. My occupation on the date of my arrest was merchant marine.
3. The address of my residence on the date of my arrest was 2663 Wolf St., Phila.
4. This residence is Wilson Park Projects—single family dwelling.
5. I began residence at this address on 1963.
6. The date of my arrest was May 29, 1971.
7. My residence address when I last registered was never registered.
8. My sex is male.
9. My color is Black.
10. The state or territory where I was born is New Jersey.
11. I am able to read the names on the ballot or voting machine labels.
12. I have no physical disability which will render me unable to see or mark the ballot or operate the voting machine or to enter the voting compartment or voting machine without assistance w/a.
13. I wish to be registered in the Democratic Party.
14. An Affidavit of Registration is attached.
15. My height is 5 feet 5 inches.
16. The color of my hair is black.
17. The color of my eyes is brown.
18. The date of my birth is 12-10-36.

I hereby make request for a registration card, and, please consider this a request for an absentee ballot under P.S. 623-20.2(a).

I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Andrew Coles Goosby

Date 9/13/71

Sworn to and subscribed before me this 13th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

This space for insertion by the commission of Voter Registration:

REGISTRATION AFFIDAVIT

I hereby swear or affirm that I am a citizen of the United States, that on the day of the next election I shall be at least twenty-one years of age and shall have resided in the Commonwealth of Pennsylvania for one year and in the election district sixty days, that I am presently awaiting trial in Holmesberg Co. Prison because I am untried for the charges preferred against me, and I cannot afford bail, that I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Andrew Coles Goosby

Sworn to and subscribed before me this 13th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT B-1

CITY COMMISSIONERS
VOTER REGISTRATION DIVISION
GROUND FLOOR, CITY HALL ANNEX
PHILADELPHIA, PENNSYLVANIA

September 13, 1971

APPEAL FROM REFUSAL TO ALLOW REGISTRATION

1. My name is Andrew Coles Goosby.
2. My permanent address is 2663 Wolf St., Phila., Pa.
3. My temporary address is Holmesberg Co. Prison, Phila. Pa.
4. On the 13th day of September 1971, I applied to register to vote through my attorney, Ann S. Torregrossa, at the Registrar's office, City Hall, Philadelphia, Pennsylvania.
5. At that time my attorney presented all necessary signed and notarized documents to comply with 25 P.S. § 623-20.2 and 25 P.S. 623-20(a).
6. I am presently incarcerated in Holmesberg Co. Prison awaiting trial because I cannot afford bail and it is therefore impossible for me to appear in person before any registrar. I have been awaiting trial since May 29, 1971.
7. I was told by the Registrar that my application to register was refused because I could not appear in person.
8. My application to register should have been granted because:

a. I meet the requirements of 25 P.S. § 2811, and of the Pennsylvania Constitution, Article 7 § 1, i.e.,

1. I am at least 21 years of age.
2. I am a citizen of the United States.
3. I have resided in Pennsylvania for at least one year.
4. It is not necessary for me to have resided in the election district where I wish to vote

sixty days immediately preceding the election as this requirement is waived by 25 P.S. § 2813.

People who are charged with a crime and are free on bail are allowed to register and vote. I, on the other hand, am not allowed to vote solely because I cannot afford bail, and thus cannot appear before the Registrar. This is discriminatory and in violation of the United States Constitution. It means that a rich person charged with a crime can vote while a poor person cannot.

9. Wherefore I, the undersigned affiant, pray to be registered as of the date of my original application and pray that all others similarly situated be allowed to register for the forthcoming election.

10. I hereby swear or affirm that the facts set forth in the foregoing appeal are true and correct to the best of my knowledge, information and belief.

/s/ Andrew Coles Goosby

Sworn to and subscribed before me this 13th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT A-2

REQUEST FOR VOTORS' REGISTRATION

I, Theodore Youch Gumby, hereby request that you send a duly authorized Registrar or person authorized to act on his behalf to my present temporary address at Holmesberg Co. Prison since I am unable to appear in person, or register me according to the provisions of 25 P.S. § 623-20.2. To this extent I have enclosed all information required by this section as follows:

1. My name is Theodore Youch Gumby.
2. My occupation on the date of my arrest was cook.
3. The address of my residence on the date of my arrest was 901 North 48th Street.
4. This residence is 3 family dwelling. I lived on 1st floor.
5. I began residence at this address on May, 1970.
6. The date of my arrest was 7-15-'71.
7. My residence address when I last registered was never registered.
8. My sex is male.
9. My color is Black.
10. The state or territory where I was born is Reading, Pennsylvania.
11. I am able to read the names on the ballot or voting machine labels.
12. I have no physical disability which will render me unable to see or mark the ballot or operate the voting machine or to enter the voting compartment or voting machine without assistance n/a.
13. I wish to be registered in the Indep.
14. An Affidavit of Registration is attached.
15. My height is 5 feet 4 inches.
16. The color of my hair is brown.
17. The color of my eyes is brown.
18. The date of my birth is May 15, 1953.

I hereby make request for a registration card, and, please consider this as a request for an absentee ballot under 25 P.S. 623-20.2(a).

I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Theodore Youch Gumby

Date—9-13-71

Sworn to and subscribed before me this 13th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

This space for insertion by the commission of Voter Registration:

REGISTRATION AFFIDAVIT

I hereby swear or affirm that I am a citizen of the United States, that on the day of the next election I shall be at least [T.G.] eighteen years of age and shall have resided in the Commonwealth of Pennsylvania for one year and in the election district sixty days, that I am presently awaiting trial in Holmesberg Co. because I am untried for the charges preferred against me, and I cannot afford bail, that I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Ted Gumby

Sworn to and subscribed before me this 13th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT B-2

CITY COMMISSIONERS
VOTER REGISTRATION DIVISION
GROUND FLOOR, CITY HALL ANNEX
PHILADELPHIA, PENNSYLVANIA

September 13, 1971

APPEAL FROM REFUSAL TO
ALLOW REGISTRATION

1. My name is Theodore Youch Gumby.
2. My permanent address is 901 North 48th St., Phila.
3. My temporary address is Holmesberg Co. Prison, Phila. Pa.
4. On the 13th day of September 1971, I applied to register to vote through my attorney, Ann S. Torregrossa, at the Registrar's office, City Hall, Philadelphia, Pennsylvania.
5. At that time my attorney presented all necessary signed and notarized documents to comply with 25 P.S. § 623-20.2 and 25 P.S. 623-20(a).
6. I am presently incarcerated in Holmesberg Co. Prison awaiting trial because I cannot afford bail and it is therefore impossible for me to appear in person before any registrar. I have been awaiting trial since July 15, 1971.
7. I was told by the Registrar that my application to register was refused because I could not appear in person.
8. My application to register should have been granted because:

a. I meet the requirements of 25 P.S. § 2811, and of the Pennsylvania Constitution, Article 7 § 1, i.e.,

1. I am at least 18 years of age. [T.G.]
2. I am a citizen of the United States.
3. I have resided in Pennsylvania for at least one year.

4. It is not necessary for me to have resided in the election district where I wish to vote sixty days immediately preceding the election as this requirement is waived by 25 P.S. § 2813.

People who are charged with a crime and are free on bail are allowed to register and vote. I, on the other hand, am not allowed to vote solely because I cannot afford bail, and thus cannot appear before the Registrar. This is discriminatory and in violation of the United States Constitution. It means that a rich person charged with a crime can vote while a poor person cannot.

9. Wherefore I, the undersigned affiant, pray to be registered as of the date of my original application and pray that all others similarly situated be allowed to register for the forthcoming election.

10. I hereby swear or affirm that the facts set forth in the foregoing appeal are true and correct to the best of my knowledge, information and belief.

/s/ Ted Youch Gumby

Sworn to and subscribed before me this 13th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT A-3

REQUEST FOR VOTERS' REGISTRATION

I, Eric Vernon Johnson, hereby request that you send a duly authorized Registrar or person authorized to act on his behalf to my present temporary address at Holmesberg Co. Prison since I am unable to appear in person, or register me according to the provisions of 25 P.S. § 623-20.2. To this extent I have enclosed all information required by this section as follows:

1. My name is Eric Vernon Johnson.
2. My occupation on the date of my arrest was not employed.
3. The address of my residence on the date of my arrest was 1333 Bainbridge St., Phila., Pa.
4. This residence is Single family dwelling.
5. I began residence at this address on 1967.
6. The date of my arrest was May 12, 1971.
7. My residence address when I last registered was never registered.
8. My sex is male.
9. My color is Black.
10. The state or territory where I was born is Philadelphia, Pennsylvania.
11. I am able to read the names on the ballot or voting machine labels.
12. I have no physical disability which will render me unable to see or mark the ballot or operate the voting machine or to enter the voting compartment or voting machine without assistance w/a.
13. I wish to be registered in the Democratic Party.
14. An Affidavit of Registration is attached.
15. My height is 5 feet 6 inches.
16. The color of my hair is black.
17. The color of my eyes is brown.
18. The date of my birth is June 14, 1950.

I hereby make request for a registration card, and, please consider this as a request for an absentee ballot under 25 P.S. § 623-20.2(a).

I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Eric Johnson

Date Sept. 13, 1971

Sworn to and subscribed before me this 13th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

This space for insertion by the commission of Voter Registration:

REGISTRATION AFFIDAVIT

I hereby swear or affirm that I am a citizen of the United States, that on the day of the next election I shall be at least twenty-one years of age and shall have resided in the Commonwealth of Pennsylvania for one year and in the election district sixty days, that I am presently awaiting trial in Holmesberg Co. Prison because I am untried for the charges preferred against me, and I cannot afford bail, that I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Eric Johnson

Sworn to and subscribed before me this 13th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT B-3

CITY COMMISSIONERS
VOTER REGISTRATION DIVISION
GROUND FLOOR, CITY HALL ANNEX
PHILADELPHIA, PENNSYLVANIA

September 13, 1971

APPEAL FROM REFUSAL TO ALLOW REGISTRATION

1. My name is Eric Vernon Johnson.
2. My permanent address is 1742 Webster St., Phila., Pa.
3. My temporary address is Holmesberg Co. Prison, Phila. Pa.
4. On the 13th day of September 1971, I applied to register to vote through my attorney, Ann S. Torregrossa, at the Registrar's office, City Hall, Philadelphia, Pennsylvania.
5. At that time my attorney presented all necessary signed and notarized documents to comply with 25 P.S. § 623-20.2 and 25 P.S. 623-20(a).
6. I am presently incarcerated in Holmesberg Co. Prison awaiting trial because I cannot afford bail and it is therefore impossible for me to appear in person before any registrar. I have been awaiting trial since May 12, 1971.
7. I was told by the Registrar that my application to register was refused because I could not appear in person.
8. My application to register should have been granted because:

a. I meet the requirements of 25 P.S. § 2811, and of the Pennsylvania Constitution, Article 7 § 1, i.e.,

1. I am at least 21 years of age.
2. I am a citizen of the United States.
3. I have resided in Pennsylvania for at least one year.

4. It is not necessary for me to have resided in the election district where I wish to vote sixty days immediately preceding the election as this requirement is waived by 25 P.S. § 2813.

People who are charged with a crime and are free on bail are allowed to register and vote. I, on the other hand, am not allowed to vote solely because I cannot afford bail, and thus cannot appear before the Registrar. This is discriminatory and in violation of the United States Constitution. It means that a rich person charged with a crime can vote while a poor person cannot.

9. Wherefore I, the undersigned affiant, pray to be registered as of the date of my original application and pray that all others similarly situated be allowed to register for the forthcoming election.

10. I hereby swear or affirm that the facts set forth in the foregoing appeal are true and correct to the best of my knowledge, information and belief.

/s/ Eric Johnson

Sworn to and subscribed before me this 13 day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT A-4

REQUEST FOR VOTERS' REGISTRATION

I, Curtis Williams, hereby request that you send a duly authorized Registrar or person authorized to act on his behalf to my present temporary address at Holmesberg County Prison since I am unable to appear in person, or register me according to the provisions of 25 P.S. § 623-20.2. To this extent I have enclosed all information required by this section as follows:

1. My name is Curtis Williams.
2. My occupation on the date of my arrest was student, Temple applicant.
3. The address of my residence on the date of my arrest was 4823 Hawthorne St., Phila.
4. This residence is single family dwelling.
5. I began residence at this address on 1956.
6. The date of my arrest was October, 1970.
7. My residence address when I last registered was 4823 Hawthorne St., Phila., (1968).
8. My sex is male.
9. My color is Black.
10. The state or territory where I was born is Philadelphia, Pennsylvania.
11. I am able to read the names on the ballot or voting machine labels.
12. I have no physical disability which will render me unable to see or mark the ballot or operate the voting machine or to enter the voting compartment or voting machine without assistance N/A.
13. I wish to be registered in the Socialist Party.
14. An Affidavit of Registration is attached.
15. My height is 6 feet 2 inches.
16. The color of my hair is black.
17. The color of my eyes is dark brown.
18. The date of my birth is 9/16/46.

I hereby make request for a registration card, and, please consider this as a request for an absentee ballot under 25 P.S. 623-20.2(a).

I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Curtis Williams

Date Sept. 13, 1971

Sworn to and subscribed before me this 13th day of September, 1971

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

This space for insertion by the commission of Voter Registration:

REGISTRATION AFFIDAVIT

I hereby swear or affirm that I am a citizen of the United States, that on the day of the next election I shall be at least twenty-one years of age and shall have resided in the Commonwealth of Pennsylvania for one year and in the election district sixty days, that I am presently awaiting trial in Holmesberg County Prison because I am untried for the charges preferred against me, and I cannot afford bail, that I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Curtis Williams

Sworn to and subscribed before me this 13th day of September 1971

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT B-4

CITY COMMISSIONERS
VOTER REGISTRATION DIVISION
GROUND FLOOR, CITY HALL ANNEX
PHILADELPHIA, PENNSYLVANIA

September 13, 1971

APPEAL FROM REFUSAL TO ALLOW REGISTRATION

1. My name is Curtis Williams.
2. My permanent address is 4823 Hawthorne St.
3. My temporary address is Holmesberg County Prison, Phila. Pa.
4. On the 13th day of September 1971, I applied to register to vote through my attorney, Ann S. Torregrossa, at the Registrar's office, City Hall, Philadelphia, Pennsylvania.
5. At that time my attorney presented all necessary signed and notarized documents to comply with 25 P.S. § 623-20.2 and 25 P.S. 623-20(a).
6. I am presently incarcerated in Holmesberg Prison awaiting trial because I cannot afford bail and it is therefore impossible for me to appear in person before any registrar. I have been awaiting trial since October, 1970.
7. I was told by the Registrar that my application to register was refused because I could not appear in person.
8. My application to register should have been granted because:

a. I meet the requirements of 25 P.S. § 2811, and of the Pennsylvania Constitution, Article 7 § 1, i.e.,

1. I am at least 21 years of age.
2. I am a citizen of the United States.
3. I have resided in Pennsylvania for at least one year.

4. It is not necessary for me to have resided in the election district where I wish to vote sixty days immediately preceding the election as this requirement is waived by 25 P.S. § 2813.

People who are charged with a crime and are free on bail are allowed to register and vote. I, on the other hand, am not allowed to vote solely because I cannot afford bail, and thus cannot appear before the Registrar. This is discriminatory and in violation of the United States Constitution. It means that a rich person charged with a crime can vote while a poor person cannot.

9. Wherefore I, the undersigned affiant, pray to be registered as of the date of my original application and pray that all others similarly situated be allowed to register for the forthcoming election.

10. I hereby swear or affirm that the facts set forth in the foregoing appeal are true and correct to the best of my knowledge, information and belief.

/s/ Curtis Williams

Sworn to and subscribed before me this 13th day of September, 1971

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT A-5

REQUEST FOR VOTERS' REGISTRATION

I, Archie Thomas Jones, hereby request that you send a duly authorized Registrar or person authorized to act on his behalf to my present temporary address at Holmesberg Co. Prison since I am unable to appear in person, or register me according to the provisions of 25 P.S. § 623-20.2. To this extent I have enclosed all information required by this section as follows:

1. My name is Archie Thomas Jones.
2. My occupation on the date of my arrest was mechanic.
3. The address of my residence on the date of my arrest was 5825 Cobbs Creek Parkway.
4. This residence is single family dwelling.
5. I began residence at this address on 1967.
6. The date of my arrest was July 8, 1971.
7. My residence address when I last registered was never registered.
8. My sex is Male.
9. My color is Black.
10. The state or territory where I was born is Philadelphia, Pa.
11. I am able to read the names on the ballot or voting machine labels.
12. I have no physical disability which will render me unable to see or mark the ballot or operate the voting machine or to enter the voting compartment or voting machine without assistance N/A.
13. I wish to be registered in the Democratic Party.
14. An Affidavit of Registration is attached.
15. My height is 5 feet 7 inches.
16. The color of my hair is black.
17. The color of my eyes is brown.
18. The date of my birth is 9-27-'49.

I hereby make request for a registration card, and, please consider this as a request for an absentee ballot under 25 P.S. § 623-20.2 (a).

I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Archie Thomas Jones

Date 9-13-71

Sworn to and subscribed before me this 13th day of September, 1971
/s/ [Illegible]

Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

This space for insertion by the commission of Voter Registration:

REGISTRATION AFFIDAVIT

I hereby swear or affirm that I am a citizen of the United States, that on the day of the next election I shall be at least twenty-one years of age and shall have resided in the Commonwealth of Pennsylvania for one year and in the election district sixty days, that I am presently awaiting trial in Holmesberg Co. Prison because I am untried for the charges preferred against me, and I cannot afford bail, that I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Archie Thomas Jones

Sworn to and subscribed before me this 13th day of September, 1971

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT B-5

CITY COMMISSIONERS
VOTER REGISTRATION DIVISION
GROUND FLOOR, CITY HALL ANNEX
PHILADELPHIA, PENNSYLVANIA

September 13, 1971

APPEAL FROM REFUSAL TO ALLOW REGISTRATION

1. My name is Archie Thomas Jones.
2. My permanent addres is 5825 Cobbs Creek Parkway, Phila., Pa.
3. My temporary address is Holmesberg Co. Prison Phila. Pa.
4. On the 13th day of September 1971, I applied to register to vote through my attorney, Ann S. Torregrossa, at the Registrar's office, City Hall, Philadelphia, Pennsylvania.
5. At that time my attorney presented all necessary signed and notarized documents to comply with 25 P.S. § 623-20.2 and 25 P.S. 623-20(a).
6. I am presently incarcerated in Holmesberg Co. Prison awaiting trial because I cannot afford bail and it is therefore impossible for me to appear in person before any registrar. I have been awaiting trial since July 8, 1971.
7. I was told by the Registrar that my application to register was refused because I could not appear in person.
8. My application to register should have been granted because:

a. I meet the requirements of 25 P.S. § 2811, and of the Pennsylvania Constitution, Article 7 § 1, i.e.,

1. I am at least 21 years of age.
2. I am a citizen of the United States.
3. I have resided in Pennsylvania for at least one year.

4. It is not necessary for me to have resided in the election district where I wish to vote sixty days immediately preceding the election as this requirement is waived by 25 P.S. § 2813.

People who are charged with a crime and are free on bail are allowed to register and vote. I, on the other hand, am not allowed to vote solely because I cannot afford bail, and thus cannot appear before the Registrar. This is discriminatory and in violation of the United States Constitution. It means that a rich person charged with a crime can vote while a poor person cannot.

9. Wherefore I, the undersigned affiant, pray to be registered as of the date of my original application and pray that all others similarly situated be allowed to register for the forthcoming election.

10. I hereby swear or affirm that the facts set forth in the foregoing appeal are true and correct to the best of my knowledge, information and belief.

/s/ Archie Thomas Jones

Sworn to and subscribed before me this 13th day of September, 1971

/s/ [Illegible]
Notary Public

EXHIBIT A-6

REQUEST FOR VOTERS' REGISTRATION

I, Michael Mitchell, hereby request that you send a duly authorized Registrar or person authorized to act on his behalf to my present temporary address at Holmesberg Co. Prison since I am unable to appear in person, or register me according to the provisions of 25 P.S. § 623-20.2. To this extent I have enclosed all information required by this section as follows:

1. My name is Michael Mitchell.
2. My occupation on the date of my arrest was Carpet maker.
3. The address of my residence on the date of my arrest was 2525 Huntingdon St., Phila., Pa.
4. This residence is single family dwelling.
5. I began residence at this address on 1967.
6. The date of my arrest was May 8, 1971.
7. My residence address when I last registered was Never registered.
8. My sex is Male.
9. My color is Black.
10. The state or territory where I was born is Philadelphia, Pennsylvania.
11. I am able to read the names on the ballot or voting machine labels.
12. I have no physical disability which will render me unable to see or mark the ballot or operate the voting machine or to enter the voting compartment or voting machine without assistance N/A.
13. I wish to be registered in the Democratic Party.
14. An Affidavit of Registration is attached.
15. My height is 6 feet 1 inches.
16. The color of my hair is black.
17. The color of my eyes is brown.
18. The date of my birth is 7-15-'49.

I hereby make request for a registration card and, please consider this as a request for an absentee ballot under 25 P.S. 623-20.2(a).

I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Michael Mitchell

Date 9/13/71

Sworn to and subscribed before me this 13th day of September, 1971

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

This space for insertion by the commission of Voter Registration:

REGISTRATION AFFIDAVIT

I hereby swear or affirm that I am a citizen of the United States, that on the day of the next election I shall be at least twenty-one years of age and shall have resided in the Commonwealth of Pennsylvania for one year and in the election district sixty days, that I am presently awaiting trial in Holmesberg Co. Prison because I am untried for the charges preferred against me, and I cannot afford bail, that I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Michael Mitchell

Sworn to and subscribed before me this 13th day of September, 1971

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT B-6

CITY COMMISSIONERS
VOTER REGISTRATION DIVISION
GROUND FLOOR, CITY HALL ANNEX
PHILADELPHIA, PENNSYLVANIA

September 13, 1971

APPEAL FROM REFUSAL TO ALLOW REGISTRATION

1. My name is Michael Mitchell.
2. My permanent address is 2525 Huntingdon St., Phila., Pa.
3. My temporary address is Holmesberg Co. Prison Phila. Pa.
4. On the 13th day of September 1971, I applied to register to vote through my attorney, Ann S. Torregrossa, at the Registrar's office, City Hall, Philadelphia, Pennsylvania.
5. At that time my attorney presented all necessary signed and notarized documents to comply with 25 P.S. § 623-20.2 and 25 P.S. 623-20(a).
6. I am presently incarcerated in Holmesberg Co. Prison awaiting trial because I cannot afford bail and it is therefore impossible for me to appear in person before any registrar. I have been awaiting trial since May 8, 1971.
7. I was told by the Registrar that my application to register was refused because I could not appear in person.
8. My application to register should have been granted because:

a. I meet the requirements of 25 P.S. § 2811, and of the Pennsylvania Constitution, Article 7 § 1, i.e.,

1. I am at least 21 years of age.
2. I am a citizen of the United States.
3. I have resided in Pennsylvania for at least one year.

4. It is not necessary for me to have resided in the election district where I wish to vote sixty days immediately preceding the election as this requirement is waived by 25 P.S. § 2813.

People who are charged with a crime and are free on bail are allowed to register and vote. I, on the other hand, am not allowed to vote solely because I cannot afford bail, and thus cannot appear before the Registrar. This is discriminatory and in violation of the United States Constitution. It means that a rich person charged with a crime can vote while a poor person cannot.

9. Wherefore I, the undersigned affiant, pray to be registered as of the date of my original application and pray that all others similarly situated be allowed to register for the forthcoming election.

10. I hereby swear or affirm that the facts set forth in the foregoing appeal are true and correct to the best of my knowledge, information and belief.

/s/ Michael Mitchell

Sworn to and subscribed before me this 13th day of September, 1971

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT A-7

REQUEST FOR VOTERS' REGISTRATION

I, Carl Sam Lane, hereby request that you send a duly authorized Registrar or person authorized to act on his behalf to my present temporary address at Holmesberg Co. Prison since I am unable to appear in person, or register me according to the provisions of 25 P.S. § 623-20.2. To this extent I have enclosed all information required by this section as follows:

1. My name is Carl Sam Lane.
2. My occupation on the date of my arrest was welder.
3. The address of my residence on the date of my arrest was 2233 Greenwich St., Phila., Pa.
4. This residence is single family dwelling.
5. I began residence at this address on 1934.
6. The date of my arrest was June 2, 1971.
7. My residence address when I last registered was 2233 Greenwich St., Phila., Pa. (4 yrs. ago).
8. My sex is Male.
9. My color is Black.
10. The state or territory where I was born is Philadelphia, Pennsylvania.
11. I am able to read the names on the ballot or voting machine labels.
12. I have no physical disability which will render me unable to see or mark the ballot or operate the voting machine or to enter the voting compartment or voting machine without assistance N/A.
13. I wish to be registered in the Democratic Party.
14. An affidavit of Registration is attached.
15. My height is 6 feet 1 inches.
16. The color of my hair is black.
17. The color of my eyes is brown.
18. The date of my birth is 7-28-34.

I hereby make request for a registration card, and, please consider this a request for an absentee ballot under 25 P.S. 623-20.2(a).

I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Carl Sam Lane

Date 9-13-71

Sworn to and subscribed before me this 13th day of September, 1971
/s/ [Illegible]

Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

This space for insertion by the commission of Voter Registration:

REGISTRATION AFFIDAVIT

I hereby swear or affirm that I am a citizen of the United States, that on the day of the next election I shall be at least twenty-one years of age and shall have resided in the Commonwealth of Pennsylvania for one year and in the election district sixty days, that I am presently awaiting trial in Holmesberg Co. Prison because I am untried for the charges preferred against me, and I cannot afford bail, that I have read the foregoing statements made in connection with my registration and that they are true and correct and that I am legally qualified to vote.

/s/ Carl Sam Lane

Sworn to and subscribed before me this 13th day of September, 1971
/s/ [Illegible]

Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT B-7

CITY COMMISSIONERS
VOTER REGISTRATION DIVISION
GROUND FLOOR, CITY HALL ANNEX
PHILADELPHIA, PENNSYLVANIA

September 13, 1971

APPEAL FROM REFUSAL TO ALLOW REGISTRATION

1. My name is Carl Sam Lane.
2. My permanent address is 2233 Greenwich St., Phila., Pa.
3. My temporary address is Holmesberg Co. Prison, Phila. Pa.
4. On the 13th day of September 1971, I applied to register to vote through my attorney, Ann S. Torregrossa, at the Registrar's office, City Hall, Philadelphia, Pennsylvania.
5. At that time my attorney presented all necessary signed and notarized documents to comply with 25 P.S. § 623-20.2 and 25 P.S. 623-20(a).
6. I am presently incarcerated in Holmesberg Co. Prison awaiting trial because I cannot afford bail and it is therefore impossible for me to appear in person before any registrar. I have been awaiting trial since June 2, 1971.
7. I was told by the Registrar that my application to register was refused because I could not appear in person.
8. My application to register should have been granted because:

a. I meet the requirements of 25 P.S. § 2811, and of the Pennsylvania Constitution, Article 7 § 1, i.e.,

1. I am at least 21 years of age.
2. I am a citizen of the United States.
3. I have resided in Pennsylvania for at least one year.

4. It is not necessary for me to have resided in the election district where I wish to vote sixty days immediately preceding the election as this requirement is waived by 25 P.S. § 2813.

People who are charged with a crime and are free on bail are allowed to register and vote. I, on the other hand, am not allowed to vote solely because I cannot afford bail, and thus cannot appear before the Registrar. This is discriminatory and in violation of the United States Constitution. It means that a rich person charged with a crime can vote while a poor person cannot.

9. Wherefore I, the undersigned affiant, pray to be registered as of the date of my original application and pray that all others similarly situated be allowed to register for the forthcoming election.

10. I hereby swear or affirm that the facts set forth in the foregoing appeal are true and correct to the best of my knowledge, information and belief.

/s/ Carl Sam Lane

Sworn to and subscribed before me this 13th day of September, 1971

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

EXHIBIT C

IN RE: *APPEAL FROM REFUSAL TO ALLOW REGISTRATION FOR:*

Archie Thomas Jones, and
Carl Sam Lane, and
Andrew Coles Goosby, and
Michael Mitchell, and
Curtis Williams, and
Theodore Youch Gumby, and
Eric Vernon Johnson,

STIPULATION

AND NOW, this 28th day of September, 1971 it is stipulated between counsel for appellants in the above-captioned appeal, Ann S. Torregrossa, Esq., and Joseph A. Torregrossa, Esq., and City Commissioners Maurice Osser, Frank Patterson and Louis Menna, and their counsel E. G. Mekel, Esq., and Harry Wolov, Esq., City Solicitor, that, pursuant to the above appeal and hearing scheduled thereon on September 28, 1971:

1. That, for the purpose of their respective appeals, appellants meet the residency, age and citizenship requirements of the Pennsylvania Constitution and Election Laws as stated in the affidavits submitted on September 13, 1971 to the Registration Commissioners.
2. That, an individual charged with a crime who can afford bail or, who though convicted is on probation or parole, who meets the requirements for registration and who presented himself within the legal time period before a Registrar would not be denied registration.
3. That, Commissioners Osser, Patterson, and Menna, authorized Deputy Commissioner Mekel to enter into the above stipulation on their behalf.

/s/ Edward G. Mekel
EDWARD G. MEKEL
Deputy Commissioner

/s/ Ann S. Torregrossa
ANN S. TORREGROSSA, ESQ.

[Caption Omitted in Printing]

MOTION FOR TEMPORARY RESTRAINING ORDER

Filed October 6, 1971

Plaintiffs respectfully move the Court on the basis of the attached affidavits for a temporary restraining order:

1. Restraining defendants from refusing to register to vote plaintiffs and all those similarly situated; and
2. Ordering that the period of registration be reopened for a period of one week to enable plaintiffs and all those similarly situated to register to vote; and
3. Directing defendants to make registrars available at reasonable times with reasonable frequency and after reasonable notice to plaintiffs and all those similarly situated at the institutions where plaintiffs and all those similarly situated are incarcerated; and
4. Restraining defendants from preventing plaintiffs and all those similarly situated from exercising their right to vote; and
5. Ordering that absentee ballots be issued to plaintiffs and those members of their class who are registered or who subsequently register who make request for absentee ballots; and
6. Ordering that defendants retain in separate folders the registration papers of the plaintiffs and members of their class who register until the Motion for Preliminary Injunction is determined; and
7. Ordering defendants to keep in separate folders all absentee ballot requests and all returned absentee ballots until the preliminary injunction is determined; and
8. Ordering defendants to post Notices in conspicuous places in the institutions where plaintiffs and all those similarly situated are incarcerated, the form of said notice to be as the Court directs, advising plaintiffs and all those similarly situated:

(a) of the opportunity to register as specified in paragraph (3), supra, and

(b) that absentee ballots are available to plaintiffs and all those similarly situated who are registered upon request,

on the ground that immediate and irreparable injury, loss and damage will result to plaintiffs and all those similarly situated before defendants or their attorneys can be heard at a hearing on plaintiffs' motion for a preliminary injunction, as more fully appears from the affidavits attached hereto.

Respectfully submitted

/s/ _____
ANN S. TORREGROSSA, ESQ.

/s/ _____
JOSEPH A. TORREGROSSA, ESQ.

/s/ _____
JONATHAN STEIN, ESQ.

/s/ _____
HARVEY N. SCHMIDT, ESQ.

[Caption Omitted in Printing]

Affidavit in Support of Motion for Temporary Restraining Order

Filed October 6, 1971

Andrew C. Goosby, Theodore Y. Gumby, Eric V. Johnson, Archie T. Jones, Carl S. Lane, Michael Mitchell, Curtis Williams, David Casper and Robert Simmons, being duly sworn according to law, depose and say:

1. That they are the plaintiffs in the above-titled action and are duly qualified electors and eligible for registration in Philadelphia County under 25 Purdon's Statute § 2811.

2. That they have been charged with criminal offenses, are awaiting trial, and are incarcerated in Holmesburg Prison either because they cannot afford bail or because they are charged with non-bailable offenses.

3. That they were incarcerated as specified in paragraph two, supra, at the time registration was conducted.

4. That they could not physically appear before a registrar.

5. That Registration Commission of Philadelphia County has refused to register plaintiffs by mail, by proxy, or by sending a registrar to Holmesburg Prison.

6. That they have been totally foreclosed from registering to vote by the practices and policies engaged in by defendants pursuant to the Pennsylvania Election Laws.

7. That they all desire to be registered to vote in the November 2, 1971 election and all future local, state and national elections.

8. That unless a temporary restraining order is issued plaintiffs will suffer irreparable harm in that they will be prohibited from voting in all elections which are held while

they are incarcerated for the reasons stated in paragraph two above.

/s/ Andrew Goosby
ANDREW C. GOOSBY

/s/ Theodore Gumby
THEODORE Y. GUMBY

/s/ Eric V. Johnson
ERIC V. JOHNSON

/s/ Archie T. Jones
ARCHIE T. JONES

/s/ Carl Lane
CARL S. LANE

/s/ Michael Mitchell
MICHAEL MITCHELL

/s/ Curtis Williams
CURTIS WILLIAMS

/s/ David J. Casper, Jr.
DAVID CASPER

/s/ Robert Simmons
ROBERT SIMMONS

Notarized as to all signatures on page.

/s/ [Illegible]
Notary Public, Philadelphia,
Philadelphia Co.
My Commission Expires
May 7, 1973

Sworn to and subscribed before me this 30th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

[Caption Omitted in Printing]

AFFIDAVIT IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER

Filed October 6, 1971

Bobby Stockton, Nathaniel Nelson, and Hugh Williams being duly sworn according to law depose and say:

1. That they are the plaintiffs in the above titled action and are duly qualified electors and are registered to vote in Philadelphia County.

2. That they have been charged with criminal offenses, are awaiting trial, and are incarcerated in Holmesburg Prison either because they cannot afford bail or because they are charged with non-bailable offenses.

3. That upon information and belief that they will be incarcerated for reasons stated in paragraph 2, supra, on November 2, 1971, the next Election Day.

4. That they cannot physically appear to vote at a polling place on November 2, 1971.

5. That the Pennsylvania Election Code, 25 Pa. 2602 (W) (12) specifically excludes them from the class of qualified absentee electors.

6. That they will be totally foreclosed from exercising their right to vote on November 2, 1971 and in all elections, local, state, and federal which are held while they are incarcerated for reasons stated in paragraph 2, supra, due to the practices, policies engaged in by defendants pursuant to the Pennsylvania Election law.

7. That they all desire to vote in the November 2, 1971 election and all future federal, state, and local elections.

8. That unless a temporary restraining order is issued plaintiffs will suffer irreparable harm in that they will be prohibited from voting in the November 2, 1971 election and all future federal, state, and local elections which

are held while they are incarcerated for reasons stated in paragraph 2, supra.

/s/ Bobby Stockton
BOBBY STOCKTON

/s/ Nathaniel Nelson
NATHANIEL NELSON

/s/ Hugh S. Williams
HUGH WILLIAMS

Notarized as to all signatures on page.

/s/ [Illegible]
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

Sworn to and subscribed before me this 1st day of October, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

[Caption Omitted in Printing]

TEMPORARY RESTRAINING ORDER

Filed October 6, 1971

AND NOW, this day of 1971 on the basis of plaintiffs' Complaint, Motion for a Temporary Restraining Order and Affidavits In Support of Motion for a Temporary Restraining Order, and after Notice to defendants, it appearing that plaintiffs and all those similarly situated will suffer irreparable harm unless this temporary restraining order issue, it is ORDERED as follows:

(1) That defendants be and are hereby temporarily ENJOINED from refusing to register plaintiffs and all those similarly situated;

(2) That defendants be and are hereby ORDERED to reopen the period of registration for a period of one week to enable plaintiffs and all those similarly situated to register to vote; and

(3) That defendants be and are hereby ORDERED to make registrars available at reasonable times, with reasonable frequency and after reasonable notice, to plaintiffs and all those similarly situated at the institutions where plaintiffs and all those similarly situated are incarcerated;

(4) That defendants be and are hereby RESTRAINED from preventing plaintiffs and all those similarly situated from exercising their right to vote; and

(5) That defendants be and are hereby ORDERED to issue absentee ballots to plaintiffs and those members of their class who are registered or who subsequently register and who request absentee ballots; and

(6) That defendants be and are hereby ORDERED to retain in separate folders the registration papers of the plaintiffs and members of their class who register until the Motion for Preliminary Injunction is determined; and

(7) That defendants be and are hereby ORDERED to keep in separate folders all absentee ballot requests and all returned absentee ballots until the Motion for Preliminary Injunction is determined; and

(8) That defendants be and are hereby ORDERED to post a Notice in conspicuous places in the institutions where plaintiffs and all those similarly situated are incarcerated, the form of said Notice to be as the Court directs advising plaintiffs and all those similarly situated (a) of the opportunity to register as specified in paragraph (3) supra, and (b) that absentee ballots are available to plaintiffs and all those similarly situated who are registered upon request; on the ground that unless this temporary restraining order issues, plaintiffs and members of their class will suffer irreparable harm.

ORDERED at o'clock at Philadelphia, Pennsylvania.

BOND in the sum of $ to be entered.

This ORDER will expire on , 1971.

United States District Judge

[Caption Omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION

Filed October 6, 1971

Plaintiffs respectfully move the Court on the basis of the attached affidavits for a Preliminary Injunction:

1. Enjoining defendants from refusing to register to vote plaintiffs and all those similarly situated; and
2. Ordering that the period of registration be reopened for a period of one week to enable plaintiffs and all those similarly situated to register to vote, and
3. Directing defendants to make registrars available at reasonable times with reasonable frequency and after reasonable notice to plaintiffs and all those similarly situated at the institutions where plaintiffs and all those similarly situated are incarcerated; and
4. Enjoining defendants from preventing plaintiffs and all those similarly situated from exercising their right to vote; and
5. Ordering that absentee ballots be issued to plaintiffs and those members of their class who are registered or who subsequently register who make request for absentee ballots; and
6. Ordering that defendants retain in separate folders the registration papers of the plaintiffs and members of their class who register until the Motion for Preliminary Injunction is determined; and
7. Ordering defendants to keep in separate folders all absentee ballot requests and all returned absentee ballots until the preliminary injunction is determined; and
8. Ordering defendants to post Notices in conspicuous places in the institutions where plaintiffs and all those similarly situated are incarcerated, the form of said Notice to be as the Court directs, advising plaintiffs and all those similarly situated,

(a) of the opportunity to register as specified in paragraph (3) supra, and

(b) that absentee ballots are available to plaintiffs and all those similarly situated who are registered upon request,

on the ground that immediate and irreparable injury, loss and damage will result to plaintiffs and all those similarly situated before defendants or their attorneys can be heard at a final hearing as more fully appears from the affidavits attached hereto; that unless so enjoined and ordered by the Court defendants will continue to refuse to register plaintiffs and all those similarly situated and will continue to prevent plaintiffs and all those similarly situated from exercising their right to vote; and that the issuance of a Preliminary Injunction herein will not cause undue inconvenience or loss to defendants but will prevent irreparable harm to plaintiff.

Respectfully submitted,

/s/ _____
ANN S. TORREGROSSA, ESQ.

/s/ _____
JOSEPH A. TORREGROSSA, ESQ.

/s/ _____
JONATHAN STEIN, ESQ.

/s/ _____
HARVEY N. SCHMIDT, ESQ.

[Caption Omitted in Printing]

Affidavit in Support of Motion for Preliminary Injunction

Filed October 6, 1971

Andrew C. Goosby, Theodore Y. Gumby, Eric V. Johnson, Archie T. Jones, Carl S. Lane, Michael Mitchell, Curtis Williams, David Casper and Robert Simmons, being duly sworn according to law, depose and say:

1. That they are the plaintiffs in the above-titled action and are duly qualified electors and eligible for registration in Philadelphia County under 25 Purdon's Statute § 2811.

2. That they have been charged with criminal offenses, are awaiting trial, and are incarcerated in Holmesburg Prison either because they cannot afford bail or because they are charged with non-bailable offenses.

3. That they are incarcerated as specified in paragraph two, supra, at the time registration was conducted.

4. That they could not physically appear before a registrar.

5. That Registration Commission of Philadelphia County has refused to register plaintiffs by mail, by proxy, or by sending a registrar to Holmesburg Prison.

6. That they have been totally foreclosed by registering to vote by the practices and policies engaged in by defendants pursuant to the Pennsylvania Election Laws.

7. That they all desire to be registered to vote in the November 2, 1971 election and all future local, state and national elections.

8. That unless preliminary injunction is granted plaintiffs will suffer irreparable harm in that they will be prohibited from voting in all elections which are held

while they are incarcerated for the reasons stated in paragraph two above.

/s/ Andrew Goosby
ANDREW C. GOOSBY

/s/ Theodore Gumby
THEODORE Y. GUMBY

/s/ Eric V. Johnson
ERIC V. JOHNSON

/s/ Archie T. Jones
ARCHIE T. JONES

/s/ Carl Lane
CARL S. LANE

/s/ Michael Mitchell
MICHAEL MITCHELL

/s/ Curtis Williams
CURTIS WILLIAMS

/s/ David J. Casper, Jr.
DAVID CASPER

/s/ Robert Simmons
ROBERT SIMMONS

Notarized as to all signatures on page.

/s/ [Illegible]
Notary Public, Philadelphia,
Philadelphia Co.
My Commission Expires
May 7, 1973

Sworn to and subscribed before me this 30th day of September, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

[Caption Omitted in Printing]

Affidavit in Support of Motion for Preliminary Injunction

Filed October 6, 1971

Bobby Stockton, Nathaniel Nelson, and Hugh Williams being duly sworn according to law depose and say:

1. That they are the plaintiffs in the above titled action and are duly qualified electors and are registered to vote in Philadelphia County.

2. That they have been charged with criminal offenses, are awaiting trial, and are incarcerated in Holmesburg Prison either because they cannot afford bail or because they are charged with non-bailable offenses.

3. That upon information and belief that they will be incarcerated for reasons stated in paragraph 2, supra, on November 2, 1971, the next Election Day.

4. That they cannot physically appear to vote at a polling place on November 2, 1971.

5. That the Pennsylvania Election Code, 25 Pa. 2602 (W) (12) specifically excludes them from the class of qualified absentee electors.

6. That they will be totally foreclosed from exercising their right to vote on November 2, 1971 and in all elections, local, state, and federal which are held while they are incarcerated for reasons stated in paragraph 2, supra, due to practices and, policies engaged in by defendants pursuant to the Pennsylvania Election law.

7. That they all desire to vote in the November 2, 1971 election and all future federal, state, and local elections.

8. That unless a preliminary injunction is issued plaintiffs will suffer irreparable harm in that they will be prohibited from voting in the November 2, 1971 election and all future federal, state, and local elections.

which are held while they are incarcerated for reasons stated in paragraph 2, supra.

/s/ Bobby Stockton
BOBBY STOCKTON

/s/ Nathaniel Nelson
NATHANIEL NELSON

/s/ Hugh Williams
HUGH WILLIAMS

Notarized as to all signatures on page.

/s/ [Illegible]
Notary Public, Philadelphia,
Philadelphia Co.
My Commission Expires
May 7, 1973

Sworn to and subscribed before me this 1st day of October, 1971.

/s/ [Illegible]
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 7, 1973

[Caption Omitted in Printing]

PRELIMINARY INJUNCTION

Filed October 6, 1971

AND NOW, this day of , 1971 on the basis of plaintiffs' Complaint, Motion for a Preliminary Injunction, and Affidavits In Support of Motion for a Preliminary Injunction, and after Notice of defendants and after hearing, it appearing that plaintiffs and all those similarly situated will suffer irreparable harm unless this Preliminary Injunction issues, it is ORDERED as follows:

(1) That defendants be and are hereby enjoined from refusing to register plaintiffs and all those similarly situated;

(2) That defendants be and are hereby ORDERED to reopen the period of registration for a period of one week to enable plaintiffs and all those similarly situated to register to vote; and

(3) That defendants be and are hereby ORDERED to make registrars available at reasonable times, with reasonable frequency and after reasonable notice, to plaintiffs and all those similarly situated at the institutions where plaintiffs and all those similarly situated are incarcerated;

(4) That defendants be and are hereby RESTRAINED from preventing plaintiffs and all those similarly situated from exercising their right to vote; and

(5) That defendants be and are hereby ORDERED to issue absentee ballots to plaintiffs and those members of their class who are registered or who subsequently register and who request absentee ballots; and

(6) That defendants be and are hereby ORDERED to retain in separate folders the registration papers of the plaintiffs and members of their class who register until the Motion for Preliminary Injunction is determined; and

(7) That defendants be and are hereby ORDERED

to keep in separate folders all absentee ballot requests and all returned absentee ballots until the Motion for Preliminary Injunction is determined; and

(8) That defendants be and are hereby ORDERED to post a Notice in conspicuous places in the institutions where plaintiffs and all those similarly situated are incarcerated, the form of said Notice to be as the Court directs advising plaintiffs and all those similarly situated:

(a) of the opportunity to register as specified in paragraph (3) supra, and

(b) that absentee ballots are available to plaintiffs and all those similarly situated who are registered upon request;

on the ground that unless this Preliminary Injunction issues, plaintiffs and members of their class will suffer irreparable harm.

ORDERED at o'clock at Philadelphia, Pennsylvania.

BOND in the sum of $ to be entered.

_____

United States District Judge

[Caption Omitted in Printing]

MOTION FOR THREE-JUDGE COURT

Filed October 7, 1971

Plaintiffs respectfully move for the appointment of a three-judge court to hear the above-captioned case and assign the following reasons in support thereof:

1. This case involves a prayer for declaratory judgment and permanent injunction to enjoin (a) the refusal of defendants to register to vote the above-named plaintiffs who are not registered and (b) the refusal of defendants to allow all plaintiffs to vote pursuant to the Pennsylvania Election Laws, First Class City Permanent Registration Act, 1937, March 30, P.L. 115, §§ 1-46, 25 Purdon's Statutes § 623-1 - § 623-46, and Pennsylvania Election Code, 1937, June 3, P.L. 1333, Art. I, § 102, as amended 1963, August 13, P.L. 707, § 1, 25 Purdon's Statutes § 2602 (w) (12);

2. Said Pennsylvania Election Laws are statutes of Statewide application;

3. Defendants Osser, Patterson, Menna, Mekel, Welsh, Hendricks, Creamer and Tucker are state officers or local officers performing state functions;

4. Said Pennsylvania Election Laws, First Class Permanent Registration Act and Pennsylvania Election Code is challenged as being unconstitutional on its face and as applied in violation of the first, eighth and fourteenth amendments to the United States Constitution and Article I, section 2 of the United States Constitution, said constitutional issues being substantial;

5. The principal issues in this case are substantially identical to the issues involved in the cases of Fair et al. v. Osser et al., Civil Action No. 71-2212, Eastern District of Pennsylvania, and Gilhool et al. v. Chairman and Commissioners, Philadelphia County Board of Elections, et al., Civil Action No. 69-2139, Eastern District

of Pennsylvania, in which three-judge courts were convened.

Respectfully Submitted

/s/ _____
ANN S. TORREGROSSA, ESQ.

/s/ _____
JOSEPH A. TORREGROSSA, ESQ.

/s/ _____
JONATHAN STEIN, ESQ.

/s/ _____
HARVEY N. SCHMIDT, ESQ.

[Caption Omitted in Printing]

ORDER

Filed October 6, 1971

And now, this day of , 1971, upon Motion of Plaintiffs to convene a three-judge Court to hear the above-captioned action, and after hearing thereon, it is ORDERED that a three-judge court be and the same is hereby CONVENED.

United States District Judge

PARTIAL TRANSCRIPT OF THE ORAL OPINION OF TROUTMAN, J.

Filed October 7, 1971

THE COURT: Mr. Wolov, you spoke about the possibility of putting on additional testimony. This would be testimony relative to the administrative burden involved, right?

MR. WOLOV: That is right. Burden on the Registration Commission and burden on the prison system.

THE COURT: Well, as we recessed for lunch, there was some indication that the parties did not intend to present testimony on the question of administrative burdens, and we proceeded accordingly to review the record and consider the arguments of Counsel, and I believe are prepared to make a disposition of the matter which as I see it does not at this point involve the question of administrative burdens. We have carefully considered the arguments of Counsel.

I should like to state that I appreciate that Counsel were completely candid and completely honest with the Court in their presentations of this case.

I presume that neither Counsel nor the Court, by virtue of the short period of time involved, have had the opportunity to do all the research that the question may deserve. On the other hand, the urgency of the matter as presented by the Plaintiffs is such that we feel some compulsion to give you an early and an immediate decision on the basis of what is before us.

The case is apparently unique and apparently is one of first impression, to the extent that it involves a situation where the Attorney General of the Commonwealth appears before the Court as a Defendant and on behalf of the Commonwealth as a Defendant, himself as a Defendant, and the Secretary of the Commonwealth as a Defendant, concedes in open court the unconstitutionality of the Act in question.

Following conferences in Chambers on Monday we have used every moment of available time to study the ramifications of the many questions involved in this case,

and independent of the presentations of Counsel have reviewed the Election Code of the Commonwealth of Pennsylvania and the Administrative Code of the Commonwealth of Pennsylvania to which reference was made this morning.

We note, for example, that as regards the Registration Commission, 25 Purdon's Pennsylvania Statutes Annotated, Section 623.4 provides that the Commission may make regulations not inconsistent with this Act or with the laws of the Commonwealth.

It provides further in Section 623-7 that the Commission may employ special Counsel to advise the Commission from time to time regarding its powers and duties, and concerning the best methods of legal procedure for carrying out the various provisions of the Act, which Counsel is authorized to appear for and represent the Commission "on all appeals taken from its decisions or orders to a Court of Common Pleas."

Moreover, it provides that in any suit—I am referring to Section 2652—that in any suit brought by or against any County Board the Secretary of the Commonwealth shall be permitted to intervene on behalf of the Commonwealth at any stage of the proceedings.

Now, the Administrative Code to which reference was made this morning, as found in 71 Purdon's Statutes details the responsibilities of the Attorney General, among others. We have noted Section 512 of the Code, as found at Section 192 of 71 Purdon's, which establishes the procedure to be followed by a department, board, commission, officer, etc., in connection with any legal difficulty or dispute which arises or in which litigation is commenced.

Reference is there made to the Department of Justice, and imposes upon the Department of Justice the obligation of rendering legal advice.

It further provides that any such department may not legally engage an Attorney to represent the department in matters relating to public business.

And we have also noted, among others, Section 292, 293, as found in Purdon's, which are Sections 902 and 903, respectively, in the Administrative Code, which details the responsibilities of the Department of Justice of the Commonwealth; describes that it is the duty of said de-

partment to furnish legal advice, to supervise, direct and control all of the legal business of every administrative department; beyond that, to represent the Commonwealth or any department in any litigation to which the Commonwealth may be a party.

We recognize that there may be a doubt as to whether the Administrative Code applies to the Registration Commission, but even if it does not, the Commission is obliged to follow the law, and the Attorney General is charged with certain responsibilities as regards the Commonwealth.

Now, here we find in our case the Attorney General appears before this Court and concedes unconstitutionality of the Act in question on behalf of himself, the Commonwealth and the Secretary of the Commonwealth which has been previously indicated is by the Code involved in election matters.

This case is to that extent unlike the student registration case, in which the Attorney General submitted an opinion to the Secretary of the Commonwealth. And while the Court in that case by agreement extended the registration period, the fact is that the proceedings were predicated upon a pre-existing opinion rendered by the Attorney General in the discharge of what he assumed were his proper duties under the circumstances.

This case comes before us without the rendition of an opinion, but with a concession of unconstitutionality without a prior opinion or directive addressed to the Secretary of the Commonwealth or to the Registration Commission or to others charged with the responsibility of administering the election laws.

It has been suggested this morning in oral argument that the Commission is ministerial in its functions, that it must comply with the State law, and it has also been very frankly stated that if the Commission is bound by the Attorney General's action, there is no issue. That becomes, in the language of Counsel, the end of the case.

Now, in effect we are being asked, absent an opinion by the Attorney General, absent his recommendation as to proper procedures, absent his expertise and the expertise of those upon whom he may properly call, to declare this

Act unconstitutional and to establish our own procedures as to registration.

Obviously, this Court is not endowed with the expertise to establish procedures which might be considered reasonable under the peculiar circumstances of this case, which might not be considered burdensome. Indeed, even with the benefit of testimony, it is doubtful that we could fairly and adequately develop a plan of registration on the short notice demanded by the parties.

The Defendants, other than those on whose behalf concessions have been made by the Attorney General, suggest that no substantial issue of Constitutional law is involved.

The threshold question is whether they have the legal right to raise the question in this proceeding, considering that they have received no opinion from the Attorney General, have received no directive, have had no plan suggested to them such as would implement the position taken by the Attorney General. Thus, if they do not have the right to demand a Constitutional adjudication, at least prior to the proper preliminary steps having been taken by the proper legal officers of the Commeanwealth, we find ourselves in the position where we are, in effect, being asked by the Defendants who have not conceded, for some type of advisory opinion; and as competent and capable Counsel in this case so well know, a controversy presented to the Court must be one that is appropriate for judicial determination. It must touch the legal relation of the parties having adverse legal interests. But there are no adverse legal interests as between the Commonwealth and the Plaintiffs. The adverse legal interests existing, if they do exist as between the Plaintiffs and the Defendant Commissioners, who even to this day have not had the opportunity to react to a proper opinion by the Attorney General such as was submitted in the student registration case, the business of the Federal Courts are limited to questions in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part these words define the role assigned to the judiciary in a tripartite allocation of power to assure that the Federal Courts will not intrude into areas committed to other branches of government.

Unconstitutional statutes there may be, but unless they are involved in a case properly susceptible of judicial determination, Courts have no power to pronounce that they are unconstitutional. And the reluctance of the Courts to pass on Constitutional issues, unless absolutely necessary, has led, as you know, to a set of rules as to what constitutes a justiciable case or controversy.

We are concerned, as to whether the Defendants are a proper party to request the adjudication of the issue in this case, even aside from the question of the lack of controversy and the lack of a justiciable issue because of the concessions made by the Attorney General in his capacity defined by statute.

The Courts do not render advisory opinions. They require the presentation of concrete legal issues in actual cases.

In view of the concessions made by the Attorney General, it is our belief that a substantial controversy between parties having adverse legal interests does not exist.

It has been stated that no Federal Court has jurisdiction to pronounce any statute, either of the State or of the United States void because irreconcilable with the Constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies.

Now, in the instant case the Attorney General, as the chief legal officer of the Commonwealth, obviously represents, as Counsel have stated in their arguments this morning, the "prinicpal" Defendant or Defendants. The position taken by the remaining Defendants seems to be the result of the fact that the Attorney General has not, in accordance with his past practice, rendered an opinion together with suggested procedures, plans, etc., covering the subject matter of the opinion.

It is, therefore, our conclusion that in the posture of this case as it presently exists that there is no controversy in the sense in which that term is used by the Courts, and we find ourselves compelled to, therefore, dismiss the complaint. It is so ordered.

That renders unnecessary, of course, the matter of our reaching the question of a temporary restraining order.

It also renders unnecessary our reaching the question of the convening of a three-Judge Court.

Court will be in recess.

MR. TORREGROSSA: Your Honor, I just want to make one statement for the record. We do have a witness available who will testify to the procedures and plans outlined to enable our class to register and vote. And this has been suggested by the Attorney General, that he testify and outline the procedures and plans.

MR. ROTH: Your Honor, we would also like to submit that if Your Honor wishes, the Attorney General will come forth with an opinion today, if that seems to be the only procedural problem involved in the case.

THE COURT: That is more than a procedural problem. I think the Court has expressed its rulings as clearly as it can, considering that we have not had the opportunity to reflect and re-reflect upon the careful verbiage of a carefully written opinion. If the Attorney General submits an opinion, I do not know whether that will lead to any further difficulties or not. If it does, then that is a matter which you will have to meet in connection with, I would assume, another action. There is no presumption in my mind that the Defendants will or will not comply with a proper opinion of the Attorney General. This is a matter, I think, that they have to decide once it is submitted.

MR. WOLOV: I would like to point out to the Court, sir, that the same question was raised in Fare vs. Osser, which as the Attorney General's opinion again, and there the Court said "We will not determine that question in this Court. That is going to be an action sometime in the State Courts, and the State Courts will determine that question. We are not going to be called upon to determine that question."

THE COURT: Well, I do not think this Court should be called upon to determine matters and questions which are properly the function of the State Courts. For what it is worth, I agree to that extent. When it is a proper function for the State Courts, and when it is a proper function for this Court, again depends upon the facts and circumstances.

MR. WOLOV: Thank you.

MR. TORREGROSSA: Your Honor, excuse me. Will you issue an order dismissing the complaint along the lines that you have mentioned, or will it be noted in the docket?

THE COURT: I have ruled from the bench, Mr. Torregrossa, because I felt you were entitled to prompt consideration. I see no necessity for any further order.

MR. TORREGROSSA: Fine.

THE COURT: It is part of the record. The Clerk will, of course, enter a minute order dismissing the complaint, but that is purely a formality.

MR. TORREGROSSA: Fine.

THE COURT: Thank you very much, gentlemen. Court will be in recess.

[Caption Omitted in Printing]

ORDER

Filed October 7, 1971

TROUTMAN, J.

AND NOW, this 6th day of October, 1971, IT IS ORDERED that plaintiffs' complaint in the above captioned matter is hereby DISMISSED WITH PREJUDICE.

BY THE COURT,

/s/ E. Mac Troutman
J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1935

ANDREW C. GOOSBY,
Holmesburg Prison
Philadelphia, Pa. and

THEODORE Y. GUMBY,
Holmesburg Prison
Philadelphia, Pa. and

ERIC V. JOHNSON,
Holmesburg Prison
Philadelphia, Pa. and

ARCHIE T. JONES,
Holmesburg Prison
Philadelphia, Pa. and

CARL S. LANE,
Holmesburg Prison
Philadelphia, Pa. and

MICHAEL MITCHELL,
Holmesburg Prison
Philadelphia, Pa. and

CURTIS WILLIAMS,
Holmesburg Prison
Philadelphia, Pa. and

DAVID CASPER,
Holmesburg Prison
Philadelphia, Pa. and

ROBERT SIMMONS,
Holmesburg Prison
Philadelphia, Pa. and

BOBBY STOCKTON,
Holmesburg Prison
Philadelphia, Pa. and

NATHANIEL NELSON,
Holmesburg Prison
Philadelphia, Pa. and

HUGH WILLIAMS,
Holmesburg Prison
Philadelphia, Pa.,

on behalf of themselves and
all others similarly situated
APPELLANTS

vs.

MAURICE S. OSSER, City Commissioner
City Hall Annex
Philadelphia, Pa. and

FRANK PATTERSON, City Commissioner
City Hall Annex
Philadelphia, Pa. and

LOUIS MENNA, City Commissioner
City Hall Annex
Philadelphia, Pa. and

EDWARD G. MEKEL, Deputy Commissioner
City Hall Annex
Philadelphia, Pa. and

JACK WELSH, Voting Registration Supervisor
City Hall Annex
Philadelphia, Pa.

REGISTRATION COMMISSION FOR THE CITY OF PHILADELPHIA
City Hall Annex
Philadelphia, Pa. and

COMMONWEALTH OF PENNSYLVANIA
and

J. SHANE CREAMER, Attorney General
Commonwealth of Pennsylvania
Harrisburg, Pa. and

C. DELORES TUCKER, Secretary of the Commonwealth
Commonwealth of Pennsylvania
Harrisburg, Pa. and
EDWARD J. HENDRICKS
Superintendent of Prisons for Philadelphia County

(D. C. Civil No. 71-2380)

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Submitted under Third Circuit Rule 12(6)
on October 21, 1971

Before: ALDISERT, GIBBONS and ROSENN,
Circuit Judges

OPINION OF THE COURT

(Filed October 26, 1971)

PER CURIAM:

This appeal from the district court's order of October 6, 1971 requires us to decide whether the court erred in dismissing plaintiffs' complaint. We are persuaded that there was no error and will affirm.

We have concluded that the substantive constitutional challenge to the two Pennsylvania statutes was wholly insubstantial and that the convening of a statutory court was not required under 28 U.S.C.A. § 2281. Baily vs. Patterson, 396 U.S. 31 (1962).

Plaintiffs, untried detainees in Philadelphia prisons, have alleged that the First Class County (Philadelphia) Permanent Registration Act of March 30, 1937, P.L. 115, as amended by the Act of August 13, 1963, P.L. 707 § 1,

25 PURD. STAT. ANNO. § 2602(w)(12), offended the equal protection clause and are therefore unconstitutional. The former statute regulates voting registration; the latter, "qualified absentee elector".

Thus, at the threshold, we emphasize that the attacked statutes do not control the right to vote. The distinction between the mechanics of controlling the exercise of the franchise, and its selective distribution, is made clear in *McDonald* v. *Board of Election Commission of Chicago*, 394 U.S. 802 (1969). Compare *Stephens* v. *Yeoman*, 327 F. Supp. 1182 (D.N.J. 1970). Regulations setting forth the mechanics of controlling the exercise of the franchise are measured by the test that "statutory classifications will be set aside only if no ground can be conceived to justify them." *McDonald, supra*, 394 U.S. at 809.

Measured by this test, the Pennsylvania legislative scheme requiring that places of registration be open to the public, *Devlin* v. *Osser*, 434 Pa. 408, 254 A.2d 303 (1969), and that absentee ballots not be made available to those "confined in a penal institution or a mental institution," 25 PURD. STAT. ANNO. § 2602(w)(12), clearly may not be set aside. *Ray* v. *Commonwealth of Pennsylvania*, 276 A.2d 509 (1971).

We have carefully considered each of the contentions raised by the appellants and find them to be without merit. Under ordinary circumstances, we would be inclined to present an extended discussion of the controlling issues. Since the emergency nature of this appeal suggests an immediate adjudication by us, we have limited our opinion to this brief statement.

The judgment of the district court dismissing the complaint will be affirmed.

To the Clerk:

Please file the foregoing opinion

/s/ Rugerro Aldisert
Circuit Judge

[Caption Omitted in Printing]

Present: ALDISERT, GIBBONS and ROSENN,
Circuit Judges

JUDGMENT

Filed October 26, 1971

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted by counsel under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed October 7, 1971, which dismissed the complaint be, and the same is hereby affirmed. Costs taxed against Appellants.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

October 26, 1971

[Caption Omitted in Printing]

Present: ALDISERT, GIBBONS and ROSENN,
Circuit Judges

ORDER AMENDING SLIP OPINION OF OCTOBER 26, 1971
Filed November 11, 1971

It is ORDERED that the slip opinion heretofore filed on October 26, 1971, be and the same is amended as follows:

1. The last five lines of the second paragraph on page four (4) are deleted and the following substituted therefor: "as amended by the Act of August 14, 1963, P.L. 900, 25 PURD. STAT. ANNO. § 623-1 et seq., and Pennsylvania Election Code, Act of 1937, P.L. 1333, Art. I, Sec. 102, as amended by the Act of August 13, 1963, P.L. 707, 25 PURD. STAT. ANNO. § 2602(w)(12), offend the equal protection clause and are therefore unconstitutional. The former statute regulates voting registration; the latter defines qualified absentee elector."

2. The first line on page five (5) is deleted and the following substituted therefor: "immediate adjudication, we have limited our opinion".

BY THE COURT

RUGGERO J. ALDISERT
Circuit Judge

DATED: November 11, 1971

A True Copy:

Teste:

Clerk of the United States Court of
Appeals for the Third Circuit

[Caption Omitted in Printing]

Before SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, and HUNTER, *Circuit Judges*

ON PETITION FOR REHEARING BEFORE THE COURT EN BANC WITH SEPARATE DISSENT BY CIRCUIT JUDGE ADAMS

Filed December 17, 1971

PER CURIAM:

Upon consideration of the petition for rehearing, the prayer of the petition is denied. Judges Van Dusen, Adams and Rosenn would grant the petition for rehearing.

BY THE COURT

RUGGERO J. ALDISERT
Circuit Judge

DATED: December 17, 1971

ADAMS, *Circuit Judge*, dissenting.

Only in the most unusual circumstance do I believe that a judge of this court should dissent with opinion from an order of the court denying rehearing en banc. However, in my judgment, this case constitutes such an occasion.

Rule 35 of the Federal Rules of Appellate Procedure indicates that when there is no question of uniformity of decisions rehearing en banc should occur only "when the proceeding involves a question of exceptional importance." The issues "of exceptional importance" in this case are two-fold—(1) the right of unconvicted indigent prisoners

to vote, and (2) the proper adjudicatory role of a court of appeals.

As for the first issue, the complaint alleges that in Philadelphia more than 2,000 individuals, while charged with but not convicted of a crime, are incarcerated because of an inability to secure bail and are being unconstitutionally deprived of their right to vote. The plaintiffs, class representatives, assert that they possess all the qualifications of electors set forth in the Pennsylvania Election Code, Tit. 25 Pa. Stat. Ann. § 2811, but because of the operation of certain other sections of the Election Code and the activities of local election officials they cannot exercise their franchise at all.

Relying on McDonald v. Board of Election Comm'rs., 394 U.S. 802 (1969), the original panel found the allegations of the complaint to be "wholly insubstantial." In this regard, we are reminded of the language contained in Reynolds v. Sims, 377 U.S. 533, 561-62 (1964):

> "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

After the careful scrutiny mandated by *Reynolds*, it is not at all clear that *McDonald* controls the present situation. The unconvicted inmates in *McDonald* alleged in their complaint no more than the fact that they were not permitted to vote in Illinois by absentee ballot, and that this provision of the Illinois voting law violated their right to equal protection since the physically infirm were allowed to vote by absentee ballot. The record in *McDonald* never suggested that these prisoners had attempted to use alternative means to exercise their franchise. This prompted the Supreme Court to note:

> "Appellants agree that the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths

> or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *McDonald, supra*, at 808, n.6.

On the other hand, the uncontroverted allegations of the complaint in the present case—which because of the procedural posture must be assumed to be true—aver first that these prisoners cannot vote at all by absentee ballot or otherwise, and second that the disenfranchisement has occurred as a result of the poverty of the inmates, that is, unconvicted rich persons accused of crimes are able to raise enough money to go free on bail and thus exercise their right to vote in person, while the poor are not capable of paying a surety. Furthermore, the complaint here asserts that requests for alternative means have been consistently denied, and therefore alleges an absolute denial of the right to vote. Because of the significant factual differences which appear between *McDonald* and this case, I for one am not prepared to dismiss the allegations here as frivolous.

Once these crucial differences are recognized, the second of the two issues of exceptional importance becomes apparent. Federal courts must decide only the questions squarely before them. U.S. CONST., ART. III, § 2. This case involves a request that a three-judge district court be convened pursuant to 28 U.S.C. § 2281. The statute, by its terms, covers suits brought to enjoin the "enforcement, operation or execution of any State statute . . ." In addition, the Supreme Court has interpreted Section 2281 to require the existence of a substantial constitutional question prior to the convening of a three-judge court. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962). The complaint here does seek to enjoin the operation and enforcement of certain portions of the Pennsylvania election code. As a matter of procedure, then, when this Court is asked to rule on the propriety of a denial of a request for a three-judge court, if the other tests for convening such a court are met, *see e.g.*, Reed Enterprises v. Corcoran, 354 F.2d 519

(D.C. Cir. 1963), our primary inquiry, and in my view of this case the only inquiry, should go to the substantiality of the constitutional claim asserted. To decide the merits, as the panel did here, is to usurp the function of the three-judge court.

Therefore, without reaching the ultimate issues of the case before us, it is clear that because this case is different from *McDonald*, serious constitutional questions unanswered by *McDonald* still exist. Because these differences alone should result in a remand for the purpose of convening a three-judge court, I respectfully dissent from a denial of rehearing en banc—a rehearing which would enable the full court to determine whether a substantial question of constitutional dimension exists.

[Caption Omitted in Printing]

Present: ALDISERT, GIBBONS and ROSENN,
Circuit Judges

JUDGMENT

Filed December 27, 1971

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted by counsel under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed October 7, 1971, which dismissed the complaint be, and the same is hereby affirmed. Costs taxed against Appellants.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

October 26, 1971

Certified as a true copy and issued in lieu of a formal mandate on December 27, 1971.

Test:

THOMAS QUINN
Clerk, United States Court of
Appeals for the Third Circuit

SUPREME COURT OF THE UNITED STATES

No. 71-6316

ANDREW C. GOOSBY, ET AL., PETITIONERS

v.

MAURICE OSSER, ET AL.

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 475228 107

[Caption Omitted in Printing]

Present: ALDISERT, GIBBONS and ROSENN,
Circuit Judges

JUDGMENT

Filed December 27, 1971

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted by counsel under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed October 7, 1971, which dismissed the complaint be, and the same is hereby affirmed. Costs taxed against Appellants.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

October 26, 1971

Certified as a true copy and issued in lieu of a formal mandate on December 27, 1971.

Test:

THOMAS QUINN
Clerk, United States Court of
Appeals for the Third Circuit

SUPREME COURT OF THE UNITED STATES

No. 71-6316

ANDREW C. GOOSBY, ET AL., PETITIONERS

v.

MAURICE OSSER, ET AL.

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 478228 107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .

ANDREW C. GOOSBY, ET AL.,
Petitioners,

v.

MAURICE OSSER, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF (ATTACHED) AS AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

AND Now, this 6th day of March, 1972, consent to file a Brief in Support of Petition for Certiorari having been refused by certain Respondents, the organizations listed below move this Honorable Court for leave to file their Brief as Amici Curiae, attached hereto, in support of the Petition for Certiorari:

American Jewish Committee (National)
American Jewish Committee, Philadelphia Chapter
American Civil Liberties Union, Pennsylvania Chapter
Barbwire Society
The Committee of Seventy
National Emergency Civil Liberties Committee
National Lawyers Guild
Pennsylvania Prison Society
Philadelphia Urban Coalition, Criminal Justice Task Force
Prisoners Rights Council

Of Counsel:
SAMUEL RABINOVE
American Jewish Committee
165 East 56th Street
New York, N. Y. 10022

HERBERT B. NEWBERG
ALLAN H. REUBEN
Room 402, Pennsylvania Bldg.
1500 Chestnut Street
Philadelphia, Pa. 19102
Attorneys for American Jewish Committee (National) and American Jewish Committee, Philadelphia Chapter, as Amici Curiae

MICHAEL VON MOSCHZISKER
WILBUR BOURNE RUTHRAUFF
Suite 910, 1420 Walnut Street
Philadelphia, Pa. 19102
Attorneys for The Committee of Seventy, as Amicus Curiae

THOMAS BIDDLE HARVEY, JR.
260 So. 15th Street
Philadelphia, Pa. 19102
Attorney for American Civil Liberties Union, Pennsylvania Chapter, as Amicus Curiae

BRUCE ENDY
5101 Arch Street
Philadelphia, Pa. 19139
Attorney for Barbwire Society, as Amicus Curiae

DAVID KAIRYS
DAVID RUDOVSKY
1427 Walnut Street
Philadelphia, Pa. 19102
Attorneys for National Emergency Civil Liberties Committee, as Amicus Curiae

A. HARRY LEVITAN
1307 Sansom Street
Philadelphia, Pa. 19107
Attorney for National Lawyers Guild, as Amicus Curiae

MIRIAM L. GAFNI
311 So. Juniper Street
Philadelphia, Pa. 19102
Attorney for Pennsylvania Prison Society, as Amicus Curiae

RICARDO CALVIN JACKSON
1512 Walnut Street
Philadelphia, Pa. 19102
Attorney for Philadelphia Urban Coalition, Criminal Justice Task Force, as Amicus Curiae

MARK K. KESSLER
One No. 13th Street
Philadelphia, Pa. 19107
Attorney for Prisoners Rights Council, as Amicus Curiae

JURISDICTION AND STATEMENT OF FACTS.

Amici adopt and incorporate by reference the jurisdictional and factual statements set forth in the Petition for Certiorari.

AMICI CURIAE.

Leave to intervene as amici curiae in support of the Petition for Certiorari by the community, civic and professional groups described in Appendix A hereto is sought because of the strong belief that the voting franchise, which is a fundamental right of all citizens in a democracy, is being arbitrarily and unconstitutionally denied in this case to plaintiffs and the class of untried inmates represented by them. .

QUESTIONS PRESENTED.[1]

May a state statute constitutionally deprive untried inmates of a county prison of the right to register and vote in state and federal elections

(a) when they otherwise meet all the requirements of qualified electors;

(b) when they are incarcerated only because they cannot afford or are not afforded bail for their release pending trial;

(c) when others who are unconvicted, but free on bail or are convicted but free on probation or parole are permitted to register and vote under the same statute; and

(d) when, but for the restrictions of the state statute,[2] reasonable means of registration and absentee voting are readily available for such untried inmates?

---

1. The primary concern of Amici Curiae is the ruling by the Court of Appeals on the merits that no substantial question is involved. Other jurisdictional and procedural issues are not addressed here.

2. First Class City Permanent Registration Act of March 30, 1937 P. L. 115, 25 P. S. § 623-1 et seq.

ARGUMENT.

No Compelling State Interest Exists to Support the Constitutionality of a Statute Which Deprives Untried Inmates of a County Prison of the Right to Register and Vote.

The bedrock of our system of criminal jurisprudence rests on the presumption of innocence until proven guilty. Until one accused of crime is adjudged guilty, he retains his fundamental rights of citizenship. These principles are axiomatic.

Without altering these basic tenets, our criminal justice system has developed certain practices heretofore held valid, designed to assure the attendance of accused persons for trial and submission to any sentence that may be imposed. Except for certain non-bailable offenses, all persons accused of crime have the right to be free while awaiting trial by having a court set bail which is reasonable under the circumstances and considering the severity of the crime involved. Eighth Amendment, United States Constitution. See Bail Reform Act of 1966, 18 USC, § 3146; *Stack v. Boyle,* 342 U. S. 1 (1951). Under the present system, the accident of the wealth or proverty of the accused is often determinative of whether that person will be able, as a practical matter, to afford bail and thus be free while awaiting determination of his guilt of innocence. Recently, this Court has recognized certain inherent injustices against poor people and has held that alternative punishment by imprisonment may not be imposed on a convicted person who is unable to pay a criminal fine in a lump sum because he is too poor. *Tate v. Short,* 401 U. S. 395, 91 S. Ct. 668 (1971). The bail system is not being directly attacked in the instant case—but the adverse accidental incidents of that system, at the beginning of the line before trial, are here challenged. The substantive insignificance which must be attributed to incarceration of persons while awaiting trial because they cannot afford bail, is all the more highlighted in view of the *Tate* case.

Political equality requires that everyone be permitted to vote on an equal basis—and that persons may be excluded from voting only upon a showing of compelling interest.

Accordingly, the poll tax qualifications [3] requirements that voters in school board elections be parents or property owners,[4] limiting voting on bond issues to property owners [5] and exclusions of military residents [6] have all been stricken because of the absence of any showing of compelling state interests.

From the available information, the plaintiffs involved here are from 18 to 37 years of age, have bail set ranging from one thousand dollars ($1,000) to ten thousand dollars ($10,000),[7] and, as of the filing of the Complaint, were incarcerated for a period ranging from approximately two and one-half months to three years and seven months! What compelling interest does the state have in depriving Plaintiff Johnson, who is 21 years old, from the right to vote because he cannot afford $1,500 bail while awaiting trial? Where is the compelling state interest to justify taking away the voting franchise of Plaintiff Williams, who has been detained over a year awaiting trial, because he cannot afford $2,000 bail? For how long does any supposed compelling interest of the state extend to disenfranchise and prejudge 28-year-old Plaintiff Caspar, who has been incarcerated for three years and seven months on a non-bailable offense and who is legally presumed innocent until adjudged otherwise at trial? As of October, 1971, there were over 2,000 other untried inmates just like Johnson, and Williams, and Caspar—similarly incarcerated at the same prison. This major prison population consisting of

---

3. *Harper v. Virginia State Board of Elections*, 383 U. S. 663 (1966).

4. *Kramer v. Union Free School District*, 395 U. S. 621 (1969).

5. *Cipriano v. City of Houma*, 395 U. S. 701 (1969).

6. *Carrington v. Rash*, 380 U. S. 89 (1965).

7. Three of the twelve plaintiffs have non-bailable offenses charged.

those who cannot afford bail or have non-bailable offenses, is further aggravated by detention periods which are unduly extended because of problems of court backlogs and unavailability of witnesses which are plaguing our criminal court calendars. Such detention serves only to underscore the indignities and deprivations suffered by those who are confined while awaiting trial because they are poor in contrast to those who have bought their freedom during this interval. It is unnecessary to cut off untried prisoners from the community any more than has already happened. In a small but nevertheless tangible way, allowing them to vote would evince recognition on the part of society that they still "count."

The unconstitutionality of the statute involved and the absence of any compelling state interest to justify disenfranchisement of the class of untried inmates is so self-evident that the Pennsylvania Attorney General, as a named defendant, stipulated to this effect in the proceedings below. This stipulation notwithstanding, and despite the lack of such stipulation on the part of the County Registration Commissioners, the trial court dismissed the Complaint for lack of subject matter jurisdiction and the Court of Appeals for the Third Circuit affirmed the dismissal on the grounds that no substantial question had been raised. Subsequently, in a 4 to 3 decision, a petition for rehearing was denied. In a vigorous dissent, Circuit Judge Adams pointed out that this case involves issues "of exceptional importance" and asserted that serious constitutional questions, unanswered by *McDonald v. Board of Election Commissioners*, 394 U. S. 802 (1969), relied on by the original panel, still exist. We agree. The deprivation of a political right so fundamental as the right to vote cannot be sanctioned on the basis of fine-line distinctions or on grounds of convenience in regulating the manner of exercising the franchise. See *Reynolds v. Sims*, 377 U. S. 533, 561-62 (1964). The mechanics of permitting prisoners to register and vote would not be burdensome. The State now uses procedures

for other citizens which could well be extended to prisoners—e.g., mail registration and voting, First Class City Permanent Registration Act of March 30, 1937, P. L. 115, 25 P. S. § 623-20 (Appendix B, pp. 3-4, Petition for Certiorari), now available for the infirm and those in military service, in merchant marine, or federal employment and their dependents.

CONCLUSION.

Amici urge this Court to grant the Petition for Certiorari to decide these fundamental constitutional issues of national importance.

Respectfully submitted,

HERBERT B. NEWBERG
ALLAN H. REUBEN
Room 402, Pennsylvania Bldg.
1500 Chestnut Street
Philadelphia, Pa. 19102
Attorneys for American Jewish Committee (National) and American Jewish Committee, Philadelphia Chapter, as Amici Curiae

MICHAEL VON MOSCHZISKER
WILBUR BOURNE RUTHRAUFF
Suite 910, 1420 Walnut Street
Philadelphia, Pa. 19102
Attorneys for The Committee of Seventy, as Amicus Curiae

THOMAS BIDDLE HARVEY, JR.
260 So. 15th Street
Philadelphia, Pa. 19102
Attorney for American Civil Liberties Union, Pennsylvania Chapter, as Amicus Curiae

BRUCE ENDY
5101 Arch Street
Philadelphia, Pa. 19139
Attorney for Barbwire Society, as Amicus Curiae

DAVID KAIRYS
DAVID RUDOVSKY
1427 Walnut Street
Philadelphia, Pa. 19102
Attorneys for National Emergency Civil Liberties Committee, as Amicus Curiae

Of Counsel:
SAMUEL RABINOVE
American Jewish Committee
165 East 56th Street
New York, N. Y. 10022

A. HARRY LEVITAN
1307 Sansom Street
Philadelphia, Pa. 19107
Attorney for National Lawyers Guild, as Amicus Curiae

MIRIAM L. GAFNI
311 So. Juniper Street
Philadelphia, Pa. 19102
Attorney for Pennsylvania Prison Society, as Amicus Curiae

RICARDO CALVIN JACKSON
1512 Walnut Street
Philadelphia, Pa. 19102
Attorney for Philadelphia Urban Coalition, Criminal Justice Task Force, as Amicus Curiae

MARK K. KESSLER
One No. 13th Street
Philadelphia, Pa. 19107
Attorney for Prisoners Rights Council, as Amicus Curiae

APPENDIX A.

Amici Curiae.

AMERICAN JEWISH COMMITTEE (NATIONAL)
AMERICAN JEWISH COMMITTEE, PHILADELPHIA CHAPTER

The American Jewish Committee and its Philadelphia Chapter are well-known community organizations which have long been involved in human relations matters.

AMERICAN CIVIL LIBERTIES UNION, PENNSYLVANIA CHAPTER

The American Civil Liberties Union Foundation of Pennsylvania is a public non-profit corporation; is non-paritisan; and is devoted solely to the protection and advancement of civil liberties, including the right to vote.

BARBWIRE SOCIETY

The Barbwire Society is an organization of ex-prisoners which provides needed services to prisoners, probationers and parolees.

THE COMMITTEE OF SEVENTY

The Committee of Seventy is a private non-partisan civic agency, founded in 1904. Its goal is to secure open honest elections, and to encourage an informed citizenry to exercise its franchise.

NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE

The National Emergency Civil Liberties Committee is a national association dedicated to the preservation of civil liberties and the Bill of Rights for all persons.

NATIONAL LAWYERS GUILD

The National Lawyers Guild is a national association of lawyers and legal workers who furnish legal advice and assistance to persons whose rights are denied and who request counsel.

PENNSYLVANIA PRISON SOCIETY

The Pennsylvania Prison Society seeks to effect improvement in correctional programs and services through public education, comprehensive planning and consultation with correctional officials.

PHILADELPHIA URBAN COALITION, CRIMINAL JUSTICE TASK FORCE

The Philadelphia Urban Coalition, Criminal Justice Task Force is organized to provide a forum for participants at all levels of the criminal justice system to examine the impact of the criminal justice problems; to examine the attitudes and alternatives to the problems as they relate specifically to the inner-city.

PRISONERS RIGHTS COUNCIL

The Prisoners Rights Council is an organization which pursues constitutional human rights for imprisoned people.

JURISDICTION AND STATEMENT OF FACTS.

Amici adopt and incorporate by reference the jurisdictional and factual statements set forth in the Brief for Petitioners.

AMICI CURIAE.

This brief is filed in support of the Petitioners by the community, civic and professional groups described in Appendix A hereto because of the strong belief that the voting franchise, which is a fundamental right of all citizens in a democracy, is being arbitrarily and unconstitutionally denied in this case to plaintiffs and the class of untried inmates represented by them. Written consent of all parties for the groups described in Appendix A to enter as amici and file an amicus brief in support of Petitioners has been filed with the Clerk, U. S. Supreme Court.

QUESTION PRESENTED.[1]

May a state constitutionally deprive untried inmates of a county prison of the right to register and vote in state and federal elections

(a) when they otherwise meet all the requirements of qualified electors;

(b) when they are incarcerated only because they cannot afford or are not afforded bail for their release pending trial;

(c) when others who are unconvicted, but free on bail or are convicted but free on probation or parole are permitted to register and vote under the same statutes; and

(d) when, but for the restrictions of the state statutes,[2] reasonable means of registration and absentee voting are readily available for such untried inmates?

---

1. The primary concern of Amici Curiae is the ruling by the Court of Appeals on the merits that no substantial question is involved. Other jurisdictional and procedural issues are not addressed here.

2. Permanent Registration Act of March 30, 1937 P. L. 115, 25 P. S. § 623-1 et seq. (1963); Pennsylvania Election Code, Act of August 13, 1963, P. L. 707, § 1, 25 Purdon's Statutes § 2602(w)(12).

ARGUMENT.

No Compelling State Interest Exists to Support the Constitutionality of Statutes Which Deprive Untried Inmates of a County Prison of the Right to Register and Vote.

The bedrock of our system of criminal jurisprudence rests on the presumption of innocence until proven guilty. Until one accused of crime is adjudged guilty, he retains his fundamental rights of citizenship. These principles are axiomatic.

Without altering these basic tenets, our criminal justice system has developed certain practices heretofore held valid, designed to assure the attendance of accused persons for trial and submission to any sentence that may be imposed. Except for certain non-bailable offenses, all persons accused of crime have the right to be free while awaiting trial by having a court set bail which is reasonable under the circumstances and considering the severity of the crime involved. Eighth Amendment, United States Constitution. See Bail Reform Act of 1966, 18 USC, § 3146; *Stack v. Boyle,* 342 U. S. 1 (1951). Under the present system, the accident of the wealth or poverty of the accused is often determinative of whether that person will be able, as a practical matter, to afford bail and thus be free while awaiting determination of his guilt or innocence. Recently, this Court has recognized certain inherent injustices against poor people and has held that alternative punishment by imprisonment may not be imposed on a convicted person who is unable to pay a criminal fine in a lump sum because he is too poor. *Tate v. Short,* 401 U. S. 395, 91 S. Ct. 668 (1971). The bail system is not being directly attacked in the instant case—but the adverse accidental incidents of that system, at the beginning of the line before trial, are here challenged. The substantive insignificance which must be attributed to incarceration of persons while awaiting trial because they cannot afford bail, is all the more highlighted in view of the *Tate* case.

Political equality requires that everyone be permitted to vote on an equal basis—and that persons may be excluded from voting only upon a showing of compelling interest.

Accordingly, the poll tax qualifications [3] requirements that voters in school board elections be parents or property owners,[4] limiting voting on bond issues to property owners [5] and exclusions of military residents [6] have all been stricken because of the absence of any showing of compelling state interests.

From the available information, the plaintiffs involved originally were from 18 to 37 years of age, had bail set ranging from one thousand dollars ($1,000) to ten thousand dollars ($10,000),[7] and, as of the filing of the Complaint, were incarcerated for a period ranging from approximately two and one-half months to three years and seven months! What compelling interest does the state have in depriving Plaintiff Johnson, who was then 21 years old, of the right to vote because he could not afford $1,500 bail while awaiting trial? Where is the compelling state interest to justify taking away the voting franchise of Plaintiff Williams, who was detained over a year awaiting trial, because he could not afford $2,000 bail? For how long does any supposed compelling interest of the state extend to disenfranchise and prejudge 28-year-old Plaintiff Caspar, who was incarcerated for three years and seven months on a non-bailable offense and who must be legally presumed innocent until adjudged otherwise at trial? As of October, 1971, there were over 2,000 other untried inmates just like

---

3. *Harper v. Virginia State Board of Elections,* 383 U. S. 663 (1966).

4. *Kramer v. Union Free School District,* 395 U. S. 621 (1969).

5. *Cipriano v. City of Houma,* 395 U. S. 701 (1969).

6. *Carrington v. Rash,* 380 U. S. 89 (1965).

7. Three of the twelve plaintiffs had non-bailable offenses charged. Since the filing of the Complaint, several plaintiffs have lost their status as class members because they have been discharged, transferred to institutions outside of Philadelphia county, convicted or acquitted. This will not, of course, render this case moot. *McDonald v. Board of Education,* 394 U. S. 802, 803 n. 1 (1969); *Goldberg v. Kelly,* 397 U. S. 254, 256 n. 2 (1970).

Johnson, and Williams, and Caspar—similarly incarcerated at the same prison. This major prison population consisting of those who cannot afford bail or have non-bailable offenses, is further aggravated by detention periods which are unduly extended because of problems of court backlogs and unavailability of witnesses which are plaguing our criminal court calendars. Such detention serves only to underscore the indignities and deprivations suffered by those who are confined while awaiting trial because they are poor in contrast to those who have bought their freedom during this interval. It is unnecessary to cut off untried prisoners from the community any more than has already happened. In a small but nevertheless tangible way, allowing them to vote would evince recognition on the part of society that they still "count."

The unconstitutionality of the statutes involved and the absence of any compelling state interest to justify disenfranchisement of the class of untried inmates is so self-evident that the Pennsylvania Attorney General, as a named defendant, stipulated to this effect in the proceedings below. This stipulation notwithstanding, and despite the lack of such stipulation on the part of the County Registration Commissioners, the trial court dismissed the Complaint for lack of subject matter jurisdiction and the Court of Appeals for the Third Circuit affirmed the dismissal on the grounds that no substantial question had been raised. Subsequently, in a 4 to 3 decision, a petition for rehearing was denied. In a vigorous dissent, Circuit Judge Adams pointed out that this case involves issues "of exceptional importance" and asserted that serious constitutional questions, unanswered by *McDonald v. Board of Election Commissioners*, 394 U. S. 802 (1969), relied on by the original panel, still exist. We agree. The deprivation of a political right so fundamental as the right to vote cannot be sanctioned on the basis of fine-line distinctions or on grounds of convenience in regulating the manner of exercising the franchise. See *Reynolds v. Sims*, 377 U. S. 533, 561-62 (1964). The mechanics of permitting prisoners to register and vote

would not be burdensome. The State now uses procedures for other citizens which could well be extended to prisoners—e.g., mail registration and voting, Permanent Registration Act of March 30, 1937, P. L. 115, 25 P. S. § 623-20 (Appendix to Brief of Petitioners), now available for the infirm and those in military service, in the merchant marine, or federal employment and their dependents.

CONCLUSION.

Amici urge this Court to reverse the decision of the United States Court of Appeals for the Third Circuit in this case and to remand the case for the empanelling of a three-judge court for a hearing as to the constitutionality of the Pennsylvania statutes and regulations thereunder which now serve to deprive untried inmates of Pennsylvania prisons of their fundamental right to exercise their voting franchise.

Respectfully submitted,

Of Counsel:
SAMUEL RABINOVE
American Jewish Committee
165 East 56th Street
New York, N. Y. 10022

HERBERT B. NEWBERG
ALLAN H. REUBEN
Room 402, Pennsylvania Bldg.
1500 Chestnut Street
Philadelphia, Pa. 19102
Attorneys for American Jewish Committee (National) and American Jewish Committee, Philadelphia Chapter, as Amici Curiae

MICHAEL VON MOSCHZISKER
WILBUR BOURNE RUTHRAUFF
Suite 910, 1420 Walnut Street
Philadelphia, Pa. 19102
Attorneys for The Committee of Seventy, as Amicus Curiae

IRENE H. COTTON
260 So. 15th Street
Philadelphia, Pa. 19102
Attorney for American Civil Liberties Union of Pennsylvania, as Amicus Curiae

BRUCE ENDY
5101 Arch Street
Philadelphia, Pa. 19139
Attorney for Barbwire Society, as Amicus Curiae

MIRIAM L. GAFNI
League of Women Voters of
Philadelphia, Gimbel Bldg.
8th & Market Streets
Philadelphia, Pa. 19107
Attorney for League of Women Voters of Philadelphia, as Amicus Curiae

DAVID KAIRYS
DAVID RUDOVSKY
1427 Walnut Street
Philadelphia, Pa. 19102
Attorneys for National Emergency Civil Liberties Committee, as Amicus Curiae

A. HARRY LEVITAN
1307 Sansom Street
Philadelphia, Pa. 19107
Attorney for National Lawyers Guild, as Amicus Curiae

MIRIAM L. GAFNI
311 So. Juniper Street
Philadelphia, Pa. 19102
Attorney for Pennsylvania Prison Society, as Amicus Curiae

CAROLYN TEMIN
Suite 711, 1530 Chestnut Street
Philadelphia, Pa. 19102
Attorney for Pennsylvania Program for Women and Girl Offenders, Inc., as Amicus Curiae

RICARDO CALVIN JACKSON
1512 Walnut Street
Philadelphia, Pa. 19102
Attorney for Philadelphia Urban Coalition, Criminal Justice Task Force, as Amicus Curiae

RICHARD BAZELON
Prison Research Council of
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, Pa. 19104
Attorney for Prison Research Council, University of Pennsylvania Law School, as Amicus Curiae

MARK K. KESSLER
One No. 13th Street
Philadelphia, Pa. 19107
Attorney for Prisoners' Rights Council, as Amicus Curiae

APPENDIX A.

Amici Curiae.

AMERICAN JEWISH COMMITTEE (NATIONAL)
AMERICAN JEWISH COMMITTEE, PHILADELPHIA CHAPTER

The American Jewish Committee and its Philadelphia Chapter are well-known community organizations which have long been involved in human relations matters.

AMERICAN CIVIL LIBERTIES UNION, PENNSYLVANIA CHAPTER

The American Civil Liberties Union Foundation of Pennsylvania is a public non-profit corporation; is non-partisan; and is devoted solely to the protection and advancement of civil liberties, including the right to vote.

BARBWIRE SOCIETY

The Barbwire Society is an organization of ex-prisoners which provides needed services to prisoners, probationers and parolees.

THE COMMITTEE OF SEVENTY

The Committee of Seventy is a private non-partisan civic agency, founded in 1904. Its goal is to secure open honest elections, and to encourage an informed citizenry to exercise its franchise.

LEAGUE OF WOMEN VOTERS OF PHILADELPHIA

The League of Women Voters of Philadelphia is a local chapter of a national organization which is open to all women citizens of voting age. It is a non-partisan organization whose purpose is to encourage the informed and active participation of all citizens in government and politics.

NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE

The National Emergency Civil Liberties Committee is a national association dedicated to the preservation of civil liberties and the Bill of Rights for all persons.

NATIONAL LAWYERS GUILD

The National Lawyers Guild is a national association of lawyers and legal workers who furnish legal advice and assistance to persons whose rights are denied and who request counsel.

PENNSYLVANIA PRISON SOCIETY

The Pennsylvania Prison Society seeks to effect improvement in correctional programs and services through public education, comprehensive planning and consultation with correctional officials.

PENNSYLVANIA PROGRAM FOR WOMEN AND GIRL OFFENDERS, INC.

The Pennsylvania Program for Women and Girl Offenders, Inc. is a non-profit independent organization engaged since 1968 in research, service and advocacy on behalf of women and girl offenders in Pennsylvania.

PHILADELPHIA URBAN COALITION, CRIMINAL JUSTICE TASK FORCE

The Philadelphia Urban Coalition, Criminal Justice Task Force is organized to provide a forum for participants at all levels of the criminal justice system to examine the impact of the criminal justice problems; to examine the attitudes and alternatives to the problems as they relate specifically to the inner-city.

PRISON RESEARCH COUNCIL OF UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

The Prison Research Council of University of Pennsylvania Law School was formed during the Summer of 1966 for the purpose of answering legal inquiries and request for information from prisoners who are unable to obtain this information from any other source.

PRISONERS' RIGHTS COUNCIL

The Prisoners' Rights Council is an organization which pursues constitutional human rights for imprisoned people.

INDEX

PAGE

Statement of Interest of the *Amici Curiae* 1

Issue Presented 4

ARGUMENT

A Substantial Constitutional Question, Sufficient To Warrant the Convening of a Three-Judge District Court, Is Presented by a Complaint Alleging the Denial by Pennsylvania of the Fundamental Right of Unconvicted Prisoners To Vote, Which Denial Has Not Been Shown, by the State, To Be Reasonably or Necessarily Related To Its Only Legitimate Interest of Guaranteeing the Presence of Accused Persons At Trial 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972) (en banc) 7

Brenneman v. Madigan, —— F. Supp. ——, 11 Cr. L. Rptr. 2248 (N.D. Cal. May 12, 1972) 7

Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) 3

Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964) 6

Chicago Connections v. Bensinger, No. 71C2382 (N.D. Ill. Mar. 30, 1972) 3

Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) 3

PAGE

Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) 3
Collins v. Schoonfield, —— F. Supp. ——, Civil No. 71-500-K (D. Md. May 15, 1972) 4
Conklin v. Hancock, 334 F. Supp. 1119 (D. N.H. 1971) 7
Cruz v. Beto, 405 U.S. 319 (1972) 2

Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970).... 4

Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D. N.Y. 1970) 3

Goodwin v. Oswald, —— F.2d ——, 11 Cr. L. Rptr. 2360 (2d Cir. June 19, 1972) 2
Gray v. Creamer, —— F.2d ——, No. 71-1714 (3rd Cir. Aug. 14, 1972) 2

Haines v. Kerner, 404 U.S. 519 (1972) 2
Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) 4
Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971) 3

Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971) 2
Inmates of Boys Training School v. Affleck, —— F. Supp. ——, No. 4529 (D. R.I. July 28, 1972) 3
Inmates of Cook County Jail v. Tierney, No. 68C504 (N.D. Ill. Aug. 22, 1968) 4
Inmates of Milwaukee Jail v. Petersen, 51 F.R.D. 540 E.D. Wis. 1971) 4
In Re Cisson (N.J. Super. Ct., Som. Cty., Mar. 24, 1972) 7
In Re Winship, 397 U.S. 358 (1970) 5

Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) 3
Jackson v. Hendrick, No. 71-2437 (C.P. Phil. Apr. 7, 1972) 7

PAGE

Jones v. Rouse, 457 F.2d 1318 (5th Cir. 1972) 2
Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) 4

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)..... 5

Little v. Cherry, No. LR-71-C-89 (E.D. Ark. Dec. 30, 1971) 3

McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) 4
Mead v. Parker, —— F.2d ——, No. 71-2462 (9th Cir. July 20, 1972) 2
Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972) 7
Morris v. Travisono, 310 F. Supp. 857 (D. R.I. 1970)..... 3

National Prisoners Reform Association v. Sharkey, —— F. Supp. ——, No. 4884 (D. R.I. May 9, 1972)..... 3
Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971)..... 3
Novak v. Beto, 453 F.2d 661, reh. en banc denied, 456 F.2d 1303 (5th Cir. 1972), pet. cert. filed sub nom. Sellars v. Beto, No. 71-6789 O.T. 1971 2

Palmigiano v. Travisono, 317 F. Supp. 776 (D. R.I. 1970) 4
Payne v. Whitmore, 325 F. Supp. 1191 (N.D. Cal. 1971) 7
Rodriquez v. McGinnis, 456 F.2d 79 (2d Cir. 1972) (en banc), cert. granted, —— U.S. —— (June 19, 1972) 2

Schilb v. Kuebel, 404 U.S. 357 (1971) 3
Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971)..... 4
Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972)..... 2
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 2

PAGE

Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc) 3
Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971)..... 3
Stack v. Boyle, 342 U.S. 1 (1951) 5

Taylor v. Sterrett, —— F. Supp. ——, Civ. Action No. 3-5220-B (N.D. Tex. June 5, 1972) 4
Tyler v. Ciccone, 299 F. Supp. 685 (W.D. Mo. 1969).... 7

United States ex rel. Jones v. Rundle, 453 F.2d 147 (3rd Cir. 1971) 7
United States ex rel. Kendzierski v. Brantley, 447 F.2d 806 (7th Cir. 1971) 3

Wayne County Jail Inmates v. Wayne County Bd. Comm'rs, No. 173217 (Cir. Ct. Wayne Cty., Mich. May 18, 1971) 7
Wilkinson v. Skinner, —— F.2d ——, 11 Cr. L. Rptr. 2417 (2d Cir. June 28, 1972) 2
Williams v. Illinois, 399 U.S. 235 (1970) 2
Wright v. McMann, 460 F.2d 126 (2d Cir. 1972)..... 2

Younger v. Gilmore, 404 U.S. 15 (1971) 2

Text:

Blackstone, Commentaries (1765) 6

Foote, The Coming Constitutional Crisis In Bail: II, 113 U. Pa. L. Rev. 1125 (1965) 3

Mattick & Aikman, The Cloacal Region of American Corrections, 381 Annals of the American Academy of Political and Social Sciences 109 (1969) 3

McGee, The Administration of Justice: The Correctional Process, 5 N.P.P.A.J. 225 (1959) 3

PAGE

Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941 (1970) 3

Note, Incacerating The Innocent: Pre-trial Detention In Our Nation's Jails, 21 Buf. L. Rev. 891 (Spring 1972) 3

Rankin, The Effect of Pretrial Detention, 39 N.Y.U.L. Rev. 641 (1964) 3

1970 National Jail Census (Sup. Doc., U.S. Gov't Printing Off., Wash., D.C.) 3

Black Hole of Manhattan, Time Magazine, Aug. 24, 1970, at 28-29 6

Revolt of the Powerless, 5 Newsletter of the Correctional Association of N.Y. (No. 3, June 1971) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,

Petitioners,

VS.

MAURICE OSSER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT AS *AMICI CURIAE*

Statement of Interest of the *Amici Curiae*

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation formed under the laws of the State of New York in 1939. The Fund was incorporated to assist black people to secure their constitutional rights by the prosecution of lawsuits. Under its charter, one of its purposes is to provide free legal assistance to Negroes

who suffer injustice because of race and who are unable, on account of poverty, to employ legal counsel.[1]

A central purpose of the Fund is the legal eradiction of practices in our society that bear with discriminatory harshness upon black people and upon the poor, deprived and friendless, who too often are black. To further this purpose, the Fund in 1967 established a separate corporation, the National Office for the Rights of the Indigent (N.O.R.I.), having among its objectives the provision of legal representation to the poor in individual cases and the advocacy before appellate courts of changes in legal doctrine which unjustly affect the poor. E.g., *Williams* v. *Illinois*, 399 U.S. 235 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

In 1970, the Fund commenced a national program for the purpose of promoting efforts toward prison reform. Its objectives include research to identify the most serious and fundamental problems in corrections, and test litigation or suggestion of administrative or legislative reform when appropriate.[2]

---

[1] The Fund's charter was approved by a New York Court, authoring the organization to serve as a legal aid society. It is entirely independent of other organizations, and is supported by contributions from the public.

[2] See generally, *Cruz* v. *Beto*, 405 U.S. 319 (1972); *Haines* v. *Kerner*, 404 U.S. 519 (1972); *Younger* v. *Gilmore*, 404 U.S. 15 (1971) (amicus); *Gray* v. *Creamer*, —— F.2d ——, No. 71-1714 (3rd Cir. Aug. 14, 1972); *Mead* v. *Parker*, —— F.2d ——, No. 71-2462 (9th Cir. July 20, 1972); *Wilkinson* v. *Skinner*, —— F.2d ——, 11 Cr.L. Rptr. 2417 (2nd Cir. June 28, 1972); *Goodwin* v. *Oswald*, —— F.2d ——, 11 Cr.L. Rptr. 2360 (2nd Cir. June 19, 1972) (amicus); *Wright* v. *McMann*, 460 F.2d 126 (2nd Cir. 1972); *Jones* v. *Rouse*, 457 F.2d 1318 (5th Cir. 1972); *Rodriquez* v. *McGinnis*, 456 F.2d 79 (2nd Cir. 1972) (en banc), cert. granted, —— U.S. —— (June 19, 1972); *Smith* v. *Robbins*, 454 F.2d 696 (1st Cir. 1972) (amicus); *Novak* v. *Beto*, 453 F.2d 661, reh. en banc denied, 456 F.2d 1303 (5th Cir. 1972), pet. cert. filed sub nom. *Sellars* v. *Beto*, No. 71-6789 O.T. 1971; *Inmates of Attica Correc-*

Recognizing also the discriminatory features of the American bail system,[3] and the fact that actual conditions of pretrial detention throughout the country,[4] 1) are inconsistent with the presumptively innocent status of awaiting trial prisoners, 2) threaten to adversely affect the fundamental right to a fair trial,[5] and 3) frequently bear little relationship to the State's legitimate interest of insuring the presence of the accused at trial,[6] LDF has developed

---

tional Facility v. *Rockefeller*, 453 F.2d 12 (2nd Cir. 1971); *Nolan* v. *Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *United States ex rel. Kendzierski* v. *Brantley*, 447 F.2d 806 (7th Cir. 1971); *Holt* v. *Sarver*, 442 F.2d 304 (8th Cir. 1971); *Sostre* v. *McGinnis*, 442 F.2d 178 (2nd Cir. 1971) (amicus); *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1968); *Inmates of the Boys' Training School* v. *Affleck*, —— F. Supp. ——, No. 4529 (D.R.I. July 28, 1972); *Nat'l Prisoners' Reform Ass'n* v. *Sharkey*, —— F. Supp. ——, No. 4884 (D.R.I. May 9, 1972); *Chicago Connections* v. *Bensinger*, No. 71C 2382 (N.D. Ill. Mar. 30, 1972); *Little* v. *Cherry*, No. LR-71-C-89 (E.D. Ark. Dec. 30, 1971); *Sostre* v. *Otis*, 330 F. Supp. 941 (S.D. N.Y. 1971); *Clutchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901 (S.D. N.Y. 1970); *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D. N.Y. 1970); *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.J. 1970).

The issues presented in the above cases cover a broad spectrum of the difficulties faced by prisoners in realizing their fundamental rights as American citizens.

[3] See, Foote, *The Coming Constitutional Crisis In Bail: II*, 113 U. Pa. L. Rev. 1125 (1965). *In Schilb* v. *Kuebel*, 404 U.S. 357, 372 (1971), this Court upheld an Illinois law which "brought reform and needed relief to the State's bail system."

[4] E.g., Mattick & Aikman, *The Cloacal Region of American Corrections*, 381 Annals of the American Academy of Political and Social Sciences 109 (1969); McGee, *The Administration of Justice: The Correctional Process*, 5 N.P.P.A.J. 225 (1959); 1970 Nat'l Jail Census (Sup. Doc., U.S. Gov't Printing Off., Wash., D.C.).

[5] Rankin, *The Effect of Pre-trial Detention*, 39 N.Y.U.L. Rev. 641 (1964).

[6] Note, *Constitutional Limitations on the Conditions of Pre-trial Detention*, 79 Yale L.J. 941 (1970); Note, *Incarcerating The Innocent: Pre-trial Detention In Our Nation's Jails*, 21 Buf. L. Rev. 891 (Spring 1972).

and participated in substantial nationwide litigation on behalf of pretrial detainees, beginning with the case of *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802 (1969).[7]

As will be discussed further below, the lower federal courts in the past few years have consistently applied the fundamental constitutional principles of due process of law so as to protect the rights of accused persons, incarcerated while awaiting trial, not to be subjected to measures that are, in reality, punitive, and which bear no reasonable relationship to the central purpose of pretrial detention: assuring presence of the defendant at trial. The decisions of the courts below in *Goosby* v. *Osser* appear to sanction the loss of a citizen's most precious and basic right, the vote, without requiring a strong showing by the State that such disenfranchisement is either necessary or the least restrictive means of serving some legitimate State interest. For this reason, we respectfully present our views on the issue before the Court. The parties have consented to the filing of a brief by amici, and copies of their letters of consent are being submitted to the Clerk with this Brief.

Issue Presented

1. Whether a substantial constitutional question, sufficient to warrant the convening of a three-judge District

---

[7] See generally, *Jones* v. *Wittenberg,* 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub nom. *Jones* v. *Metzger,* 456 F.2d 854 (6th Cir. 1972); *Hamilton* v. *Love,* 328 F. Supp. 1182 (E.D. Ark. 1971); *Seale* v. *Manson,* 326 F. Supp. 1375 (D. Conn. 1971); *Davis* v. *Lindsay,* 321 F. Supp. 1134 (S.D.N.Y. 1970); *Palmigiano* v. *Travisono,* 317 F. Supp. 776 (D.R.I. 1970); *Inmates of the Milwaukee Jail* v. *Petersen,* 51 F.R.D. 540 (E.D. Wis. 1971); *Taylor* v. *Sterrett,* —— F. Supp. ——, Civ. Action No. 3-5220-B (N.D. Tex. June 5, 1972); *Collins* v. *Schoonfield,* —— F. Supp. ——, Civil No. 71-500-K (D. Md. May 15, 1972); *Inmates of the Cook County Jail* v. *Tierney,* No. 68C 504 (N.D. Ill. Aug. 22, 1968).

Court, is presented by a complaint alleging that pretrial detainees in Philadelphia are absolutely denied their fundamental right to register and vote, by virtue of the combination of a state law, which specifically precludes absentee ballots, and administrative practices and policies, which foreclose alternative methods of voting by unconvicted prisoners, which denial has not been shown, by the state, to be reasonably or necessarily related to its only legitimate interest of guaranteeing the presence of accused persons at trial.

ARGUMENT

A Substantial Constitutional Question, Sufficient To Warrant the Convening of a Three-Judge District Court, Is Presented by a Complaint Alleging the Denial by Pennsylvania of the Fundamental Right of Unconvicted Prisoners To Vote, Which Denial Has Not Been Shown, by the State, To Be Reasonably or Necessarily Related To Its Only Legitimate Interest of Guaranteeing the Presence of Accused Persons At Trial.

Although the merits of petitioner's constitutional claims need not be decided at this point, the discussion below will demonstrate the substantiality of the question presented.

It is now established, as a matter of rudimentary due process, that a person may not constitutionally be punished without trial, or before his or her guilt is proven beyond a reasonable doubt. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *In Re Winship*, 397 U.S. 358 (1970). This Court, in *Stack* v. *Boyle*, 342 U.S. 1 (1951), took note of the important role which bail, or pretrial release, plays in preserving the fundamental presumption of innocence.

It may be that the State's legitimate interest of insuring the presence of accused persons at trial could justify the

detention of some persons while awaiting trial. It does not follow, however, that such incarceration of unconvicted persons authorizes the extent of oppressive institutional treatment that exists in most local jails. As Blackstone appropriately observed:

> "This imprisonment, as has been said, is only for safe custody, and not for punishment; therefore in this dubious interval between commitment and trial, a prisoner ought to be used with utmost humanity; and neither loaded with needless fetters, nor subjected to other hardships than such are requisite for the purpose of confinement only."

4 Blackstone, Commentaries 300 (1765).

And Circuit Judge Freedman, sitting as a District Judge, in *Butler* v. *Crumlish*, 229 F. Supp. 565, 567 (E.D. Pa. 1964), stated:

> "The constitutional authority for the State to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself."

In accordance with these basic principles, numerous courts around the country have granted relief to pretrial detainees who complained of unconstitutionally inhumane[1]

---

[1] Barbaric and decrepit conditions of penal confinement have been cited as one of the causes of prison insurrections—the ultimate tactical resource available to inmates who want to force change. See, *The Black Hole of Manhattan*, Time Magazine, Aug. 24, 1970, at 28-29; *Revolt of the Powerless*, 5 Newsletter of the Correctional Association of N. Y. (No. 3, June 1971). Respect for the law might be enhanced if pretrial detainees were treated in a non-punitive manner, in accord with their legal presumption of innocence.

and punitive jail conditions. In such cases, the courts determined, on the basis of the record, that the challenged restrictions were not inherent in the concept of pretrial detention, and were not reasonably or necessarily related to the State's only legitimate interest—guaranteeing the presence of accused persons at trial.[9]

It cannot be lightly assumed, without evidence,[10] that effective disenfranchisement of unconvicted prisoners is actually necessary for the maintenance of pretrial detention in Philadelphia. Indeed, it appears that the frequently used and simplified procedure of registering and voting by absentee ballots would not cause any substantial interference with the operation of the jails in Philadelphia. In any event, it would seem incumbent upon the District Court to hear testimony, and make specific findings of fact, on this critical point. Accordingly, the case should be remanded to the trial court for further proceedings in this clearly justiciable matter.

---

[9] See, *Anderson* v. *Nosser*, 456 F.2d 835 (5th Cir. 1972) (en banc); *Moore* v. *Ciccone*, 459 F.2d 574 (8th Cir. 1972); *United States ex rel. Jones* v. *Rundle*, 453 F.2d 147 (3rd Cir. 1971); *Conklin* v. *Hancock*, 334 F. Supp. 1119 (D.N.H. 1971); *Tyler* v. *Ciccone*, 299 F. Supp. 685 (W.D. Mo. 1969); *Payne* v. *Whitmore*, 325 F. Supp. 1191 (N.D. Cal. 1971); *Brenneman* v. *Madigan*, —— F. Supp. ——, 11 Cr.L.Rptr. 2248 (N.D. Cal. May 12, 1972); *Jackson* v. *Hendrick*, No. 71-2437 (C.P. Phil. Pa. Apr. 7, 1972); *Wayne County Jail Inmates* v. *Wayne County Bd. Comm'rs*, No. 173217 (Cir. Ct. Wayne Cty., Mich. May 18, 1971); *In Re Cisson* (N.J.Super. Ct., Som. Cty. Mar. 24, 1972); and cases cited in n. 7, infra.

[10] The Partial Transcript of proceedings in the District Court on October 6, 1971 shows that an offer of testimony was made relative to possible administrative burden on the Registration Commission and on the prison system, but that it was rejected as unnecessary because of the Court's disposition of the case on grounds of justiciability.

CONCLUSION

The reasoning of various courts which have granted relief from unconstitutional conditions of pretrial detention, bearing no reasonable or necessary relationship to the State's interest of insuring the presence of accused persons at trial, is in accord with this Court's fundamental pronouncements on the presumption of innocence before trial, and warrants Supreme Court approval. The judgments of the courts below appear to be in conflict with those principles, and they should therefore be reversed, and the case remanded to the District Court.

Respectfully submitted,

Jack Greenberg
Stanley A. Bass
10 Columbus Circle
Room 2030
New York, New York 10019
(212) 586-8397

Attorneys for Amici Curiae

E COP

Supreme Court, U.S.
FILED
SEP 19 197
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,
Petitioners,

v.

MAURICE OSSER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

ANN S. TORREGROSSA
JOSEPH A. TORREGROSSA
ELLIOT B. PLATT
JONATHAN M. STEIN
LAURENCE M. LAVIN
313 South Juniper Street
Philadelphia, Pennsylvania 19107
Attorneys for Petitioners

Of Counsel:
DONALD A. GIANNELLA
GREGORY M. HARVEY

August 28, 1972

Washington, D.C. • THIEL PRESS • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	9
ARGUMENT:	
I. Petitioners' case presents substantial constitutional questions which require the convening of a three-judge court since petitioners' complaint alleges that they and other pretrial detainees in Philadelphia County are absolutely denied the right to vote by the Commonwealth of Pennsylvania	12
II. Petitioners' case constitutes a case or controversy under Article III of the Constitution	28
CONCLUSION	33

TABLE OF AUTHORITIES

Cases:

Anderson v. Martin, 375 U.S. 399 (1964)	23
Anderson v. Nosser, 438 F.2d 183 (1971) *modified*, 456 F.2d 835 (5th Cir. 1972)	20
Bailey v. Patterson, 369 U.S. 31 (1962)	12, 13
Boddie v. Connecticut, 401 U.S. 371 (1971)	17
Bolling v. Sharpe, 347 U.S. 497 (1954)	22
Brown v. Board of Education, 347 U.S. 483 (1954)	22
Brown v. Board of Education, 349 U.S. 294 (1955)	11, 31

Bullock v. Carter, 405 U.S. 134 (1972) 19, 20, 23
California Water Service Co. v. City of Redding, 304 U.S. 252 (1938) 13
Carrington v. Rash, 380 U.S. 89 (1965) 15
Cipriano v. City of Houma, 395 U.S. 701 (1969) 19, 20
City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 19, 20
Conklin v. Hancock, 334 F. Supp. 1119 (D. N.H. 1971) 20
Davis v. Lindsay, 321 F. Supp. 1134 (S.D. N.Y. 1970) 20
Douglas v. California, 372 U.S. 353 (1963) 15, 22, 23
Dunn v. Blumstein, 405 U.S. 330 (1972) 19
Edwards v. California, 314 U.S. 160 (1941) 22
Evans v. Cornman, 398 U.S. 419 (1970) 19
Ex Parte Poresky, 290 U.S. 30 (1933) 13
Fair v. Osser, Civil Action No. 71-2212, Eastern District of Pennsylvania, September 27, 1971 32
Federal Trade Commission v. Dean Foods Co., 384 U.S. 597 (1966) 17
Goldberg v. Kelly, 397 U.S. 254 (1970) 3
Gomillion v. Lightfoot, 364 U.S. 339 (1960) ... 9, 10, 17, 22, 25
Goosby v. Osser, 452 F.2d 39 (3d Cir. 1971) 8, 13, 28
Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970) 23, 24
Griffin v. Illinois, 351 U.S. 12 (1956) 10, 23, 24
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 23
Guinn v. United States, 238 U.S. 347 (1915) 25
Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) 20
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 15, 16, 18, 23

Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) 23

Hobson v. Hansen, 269 F. Supp. 401 (D. D.C. 1967) *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 23

Hunter v. Erickson, 393 U.S. 385 (1969) 22

Johnson v. Pike Corp., 332 F. Supp. 490 (C.D. Cal. 1971) 23

Jones v. Wittenberg, 323 F. Supp. 93 and 330 F. Supp. 707 (N.D. Ohio 1971) *aff'd sub nom.*, Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) 20

Korematsu v. United States, 323 U.S. 214 (1944) 22

Kramer v. Union Free School District, 395 U.S. 621 (1969) 19, 20

Lane v. Wilson, 307 U.S. 268 (1939) 10, 25

Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933) 9, 13, 17

Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) 31

Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) 23

Louisiana v. United States, 380 U.S. 145 (1965) 11, 31

McDonald v. Board of Elections, 394 U.S. 802 (1969) ... *passim*

McLaughlin v. Florida, 379 U.S. 184 (1964) 15, 22

Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972) 20

Myers v. Anderson, 238 U.S. 368 (1915) 25

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) 23

Palmigiano v. Travisono, 317 F. Supp. 776 (D. R.I. 1970) 20

Re Metropolitan Railway Receivership, 208 U.S. 90 (1908) 11, 29, 30

Reynolds v. Sims, 377 U.S. 533 (1964) 15

Serrano v. Priest, 96 Cal. Rptr. 601, 487 P.2d 1241 (1970) 23

Tyler v. Ciccone, 299 F. Supp. 685 (W.D. Mo. 1969) 21

Walling v. Helmerich and Payne, Inc., 323 U.S. 37 (1944) 30

Wayne County Jail Inmates v. Wayne County Board, No. 173217, Wayne County Circuit Court, May 18, 1971 21

Williams v. Illinois, 399 U.S. 235 (1970) 10, 23, 24

Constitutional and Statutory Provisions:

Civil Rights Act, 42 U.S.C. §1983 .....2, 6

Permanent Registration Act of March 30, 1937, Pennsylvania P.L. 115, §§ 1-46 as amended, 25 Purdon's Statutes § 621-1 *et seq.* (1963) and Permanent Registration Act of April 29, 1937, Pennsylvania P.L. 487, §1, *et seq.*, as amended, Act of May 31, 1955, Pennsylvania P.L. 707, §§1 and 2, 25 Purdon's Statutes §951-2 *et seq.* (1963) 2, 3

Illinois Rev. Stat. c. 46, §19-1 to 19-3 ..... *passim*

Pennsylvania Constitution, Article I, Section 5 2

Pennsylvania Constitution, Article VII, Section 4 2

Pennsylvania Election Code, Act of June 3, 1937, Pennsylvania P.L. 1333, Article I, §102 as amended by Act of August 13, 1963, Pennsylvania P.L. 707, §§1 and 2, 25 Purdon's Statutes §2602(z)(x)(y)(z-1) and (z-3) (Supp. 1972); Act of June 3, 1937, Pennsylvania P.L. 1333, Article XII, §1210, 25 Purdon's Statutes §3050 (a) and (d) (1963) ..... *passim*

United States Code, Title 28, §1254(1) 2

United States Code, Title 28, §2281 .....2, 12, 13

United States Code, Title 28, §2284(1) 2

United States Constitution, Article I, Section 2 2

United States Constitution, Article III, Section 2 . 2, 7, 11, 28, 31

United States Constitution, Amendment I 2

United States Constitution, Amendment VIII 2

United States Constitution, Amendment XIV 2, 5

United States Constitution, Amendment XV 2, 5, 10, 25

United States Constitution, Amendment XXIV 2

Voting Rights Act of 1965, 42 U.S.C. §1971 (a)(1) and (2)(A) 2, 5, 6, 25

Miscellaneous:

Coons, Clune & Sugerman, Educational Opportunity, A Workable Constitutional Test for State Financial Structures, 57 Calif. L. Rev. 305 (1969) 24

Goldberg, Equality and Governmental Action, 39 N.Y.U.L. Rev. 205 (1964) 24

Michelman, The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969) 22, 24

Note, Supreme Court, 1968 Term, 83 Harv. L. Rev. 7 (1969) 26

Official Records of the Statistical Unit of the Pennsylvania Department of Justice, Sept. 30, 1971 3

Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stan. L. Rev. 767 (1969) 24

United States Department of Justice, 1970 National Jail Census 4

APPENDIX TO BRIEF

INDEX

United States Constitution 1a
United States Code 3a
Pennsylvania Constitution 5a
Pennsylvania Election Laws 5a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,

Petitioners,

v.

MAURICE OSSER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 88) is reported at 452 F.2d 39 (3d Cir. 1971). The opinion of Circuit Judge Arlin Adams, dissenting from the denial by the Court of Appeals of rehearing *en banc* (A. 94), is reported at 452 F.2d at 41. No written opinion was rendered by the District Court for the Eastern District of Pennsylvania, but a transcript of the oral opinion of the District Court given from the Bench is set out in the Appendix (A. 81).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 26, 1971. A timely petition for rehearing *en banc* was denied on December 17, 1971, three of seven judges dissenting. The petition for a writ of certiorari was filed on March 10, 1972, and was granted on June 26, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' case presents substantial constitutional issues which require the convening of a three-judge court where petitioners' complaint alleges that they and other unconvicted pretrial detainees in Philadelphia County are absolutely denied the right to vote by the Commonwealth of Pennsylvania.

2. Whether petitioners' case constitutes a case or controversy within the meaning of Article III of the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 2, Article III, Section 2 and Amendments 1, 8, 14, 15, and 24.

United States Code, Title 28 §§2281, 2284(1), Title 42 §1971(a)(1) and (2)(A), Title 42 §1983.

Pennsylvania Constitution, Article I, Section 5, Article VII, Section 4.

Permanent Registration Act of March 30, 1937, Pennsylvania P.L. 115, §§ 1-46, as amended, 25 Purdon's

Statutes §623-1 *et seq.* (1963) and Act of April 29, 1937, Pennsylvania P.L. 487, §1, *et seq.*, as amended Act of May 31, 1955, Pennsylvania P.L. 707, §1, *et seq.*, 25 Purdon's Statutes §951-2 *et seq.* (1963).

Pennsylvania Election Code, Act of June 3, 1937, Pennsylvania P.L. 1333, Article I, §102, as amended by the Act of August 13, 1963, Pennsylvania P.L. 707, §§1 and 2, 25 Purdon's Statutes §2602(w)(x)(y)(z-1) and (z-3) (Supp. 1972); Act of June 3, 1937, Pennsylvania P.L. 1333, Article XII, §1210, 25 Purdon's Statutes §3050(a) and (d) (1963).

The text of the above provisions is set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

Petitioners represent a class of untried pretrial detainees who possess all the voter qualifications required of a citizen of Pennsylvania and who are incarcerated in Philadelphia County prisons either because they cannot afford bail or because they are charged with non-bailable offenses. (Complaint, ¶s23, 27, and 44, A. 16, 17, and 20).[1] The class consists of approximately 2,000 persons, over 90 percent of whom are "non-white",[2] and almost

[1] At the time the complaint was filed, twelve individuals were named as representatives of petitioners' class. Subsequently, several of these named class representatives lost their status as class members, either because they have been released on bail, transferred to institutions outside of Philadelphia County, or been discharged, acquitted, or convicted. This does not, of course, render the case moot. See *McDonald v. Board of Elections*, 394 U.S. 802, 803 n. 1 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 256 n. 2 (1970).

[2] Official Records of the Statistical Unit of the Pennsylvania Department of Justice, September 30, 1971.

all of whom are indigent.[3] Petitioners desire to vote in all future federal, state and local elections and fall into two sub-classes: (a) those who were registered to vote prior to their present incarceration, and (b) those who are not registered to vote. (Complaint, ¶23, A. 16).

Petitioners allege in their complaint that the Commonwealth of Pennsylvania is absolutely denying them the right to vote because (1) their incarceration and the laws of Pennsylvania prevent them from registering and voting in person, (2) the laws of Pennsylvania prohibit them from registering by absentee means and expressly prohibit them from voting by absentee ballot because they are "confined in a penal institution", and (3) the election officials of the Commonwealth of Pennsylvania, acting pursuant to and under state law, will neither permit them to leave prison to register and vote nor bring registrars and voting machines to the prisons. (Complaint, ¶ s 30-34, 40, 47-56, A. 17-21).

Petitioners further allege that this absolute denial of the right to register and vote is unconstitutional for the following reasons, among others:

1. Petitioners are denied equal protection of the law because those who can afford bail are not denied the right to vote and, therefore, petitioners' right to vote is

---

[3]Some petitioners, for example, cannot afford to pay $100 for a $1,000 bail bond. (Complaint, ¶7, A. 12-13).

There are approximately 83,000 pretrial detainees incarcerated in the United States, 4,000 of whom are in Pennsylvania. (U.S. Dept. of Justice, 1970 National Jail Census, pp. 1 and 10). These men and women are often incarcerated for substantial periods of time while awaiting trial, some for as many as several years. One of the named class representatives, for example, was incarcerated awaiting his trial for almost 4 years (Complaint, ¶13, A. 14), and another for over one year (Complaint, ¶12, A. 14).

directly tied to their indigency and their inability to afford bail is a *de facto* poll tax. (Complaint, ¶61(a), A. 22).

2. Petitioners are denied equal protection of the law because those who are convicted of a crime but who are free on probation or parole are not denied the right to vote. (Complaint, ¶41 and Exhibit C, ¶58, A. 19, 21, and 61).

3. Petitioners are denied due process of law because they are unconvicted pretrial detainees who must be presumed innocent by the law and are being impermissibly punished without conviction. (Complaint, ¶63, A. 23).

4. Petitioners' right to vote is being infringed in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965 because the laws of Pennsylvania have the effect of denying them the right to vote because of their race. (Complaint, ¶s 59 and 61(d), A. 21-22).

5. Depriving petitioners of their right to vote is neither a necessity of nor inherently related to their incarceration. (Complaint, ¶s59 and 63, A. 21-23).

Prior to the filing of their complaint, petitioners attempted to redress these grievances by requesting that the election officials of the Commonwealth of Pennsylvania (1) permit them to register and vote by proxy exercised in person by their attorneys, or (2) permit petitioners to go to the polls on their own, by guarded transportation, if necessary, or (3) furnish the jails with polling booths, or (4) permit them to register and vote by mail or other absentee means or (5) generally to allow petitioners to register and vote by any means which they deemed advisable. (Complaint, ¶s31-34, 52 and 54, A. 17-18, 20, and 21). However, all of petitioners' requests were refused. (Complaint, ¶s34 and 52, A. 18 and 20).

Accordingly, petitioners are confronted with the situation, as alleged in their complaint, where there are no existing procedures whereby they may register and vote. (Complaint, ¶s50 and 51, A. 20).[4]

On October 6, 1972, after the election officials of the Commonwealth had refused petitioners' numerous requests, petitioners filed their complaint, on behalf of themselves and all others similarly situated, with the United States District Court for the Eastern District of Pennsylvania. Petitioners' action was brought against the Commonwealth of Pennsylvania, J. Shane Creamer, Attorney General, C. Delores Tucker, Secretary of the Commonwealth (all of whom are hereinafter referred to as the "Commonwealth" defendants) and Maurice S. Osser, Frank Patterson, and Louis Menna, City Commissioners (constituting the Board of Elections of the City and County of Philadelphia), Edward Mekel, Deputy Commissioner, Jack Welsh, Voting Registration Supervisor, the Registration Commission of Philadelphia, and Edward Hendricks, Superintendent of Philadelphia County prisons (all of whom are hereinafter referred to as the "Philadelphia" defendants).

Petitioners' complaint seeks to enjoin all defendants from depriving them of their right to register and vote in violation of their constitutional rights and in violation of the Voting Rights Act of 1965 and the Civil Rights Act.

---

[4] Since the majority of states have enacted registration and voting laws similar to those in Pennsylvania, a majority of the 83,000 pretrial detainees in the United States are disenfranchised by the existing laws. See Appendix C to petitioners' Petition for a Writ of Certiorari for a survey of United States law on the right of unconvicted pretrial detainees to register and vote.

In addition to their complaint, petitioners filed a motion for leave to proceed in forma pauperis, a motion for a three-judge court (A. 78), and motions for a temporary restraining order (A. 68) and a preliminary injunction (A. 76).

On October 6, 1971, the day the complaint was filed, the District Court granted petitioners' motion for leave to proceed in forma pauperis and held oral argument on petitioners' motion for a temporary restraining order. During the one-hour argument, the Commonwealth defendants admitted that the statutes challenged by petitioners unconstitutionally denied them the right to vote. The Philadelphia defendants, on the other hand, who claimed that they were not bound by the admission of the Commonwealth defendants, took the position that the Commonwealth's statutes did not unconstitutionally deny petitioners the right to vote.

At the conclusion of the argument, the District Court *sua sponte* dismissed petitioners' complaint on the ground that the Court lacked subject-matter jurisdiction. The District Court held that since the Commonwealth defendants had made the above-mentioned admission there was no case or controversy before the Court within the meaning of Article III of the Constitution. (A. 81, 84-85).

Two days thereafter petitioners appealed this decision to the Court of Appeals for the Third Circuit and the case was set down for oral argument during the week of October 18, 1971.

The panel of the Third Circuit to which the case was assigned notified the parties that it had decided to dispense with oral argument of the matter. On October 26, 1971, the panel, acknowledging that the matter was being hurriedly decided by it, filed a *per curiam* Opinion

affirming the decision of the District Court. The Court affirmed without discussion the District Court's finding on jurisdiction and additionally found that the substantive constitutional challenge of petitioners' complaint was wholly insubstantial in light of the decision by this Court in *McDonald v. Board of Elections*, 394 U.S. 802 (1969). Accordingly, the panel stated, there was no need for the District Court to convene a three-judge court. The Court further held that the statutes challenged by petitioners were clearly constitutional. *Goosby v. Osser*, 452 F.2d 39 (3d Cir. 1971). (A. 88, 90-91).

On November 9, 1972, petitioners filed with the Court of Appeals a petition for rehearing *en banc*. On December 17, 1971, this petition was denied *per curiam*, three of the seven judges dissenting including one member of the panel which had affirmed the decision of the District Court. Circuit Judge Arlin Adams filed an opinion dissenting from the Court's denial of rehearing. *Goosby v. Osser*, 452 F.2d at 41. (A. 94). In his dissent, Judge Adams stated that:

(a) petitioners' case was not controlled by *McDonald v. Board of Elections, supra*, but rather presented serious constitutional questions unanswered by *McDonald*, and

(b) the Court of Appeals had exceeded its proper adjudicatory role by deciding that the statutes challenged by the petitioners were constitutional.

On March 10, 1972, petitioners filed with this Court a Petition for a Writ of Certiorari, which was granted on June 26, 1972.

SUMMARY OF ARGUMENT

I. Petitioners' case presents substantial constitutional questions which require the empanelling of a three-judge court.

The Court of Appeals held that petitioners were not entitled to a three-judge court because it found that the substantive constitutional challenge of petitioners' complaint was wholly insubstantial in view of *McDonald v. Board of Elections*, 394 U.S. 802 (1969). Petitioners case is, however, distinguishable from *McDonald* and presents several substantial constitutional issues not clearly foreclosed by that decision.

First, unlike the *McDonald* appellants, petitioners are absolutely denied the very right to vote. Petitioners have alleged in their complaint an absolute denial of the franchise because they have attempted to register and vote in various ways, both by absentee means and in person, but all their attempts have been refused by the respondents. (Complaint, ¶s31-34, 52 and 54, A. 17-18, 20, and 21). In the present procedural posture of their case, the allegations of their complaint must be assumed to be true. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933). Indeed, at no time during the proceedings below or in this Court has any respondent denied that petitioners are absolutely denied the right to vote.

Second, the Pennsylvania absentee ballot statute, unlike the Illinois statute in *McDonald*, draws lines on the basis of wealth and race. While the Illinois statute did not expressly deny an absentee ballot to anyone, the Pennsylvania statute denies an absentee ballot to one "confined in a penal institution." 25 Purdon's Statutes

§2602(w)(12) (Supp. 1972). Although this legislative classification is not expressly or designedly discriminatory on the basis of wealth or race, it is grossly discriminatory *in fact*, both on the basis of wealth *and* race, because over 90 percent of the petitioners are "non-white" and indigent. As this Court has recognized in several cases, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11 (1956). Further, it should be noted that the *McDonald* appellants did not allege, as petitioners do, that they are being denied the right to vote on the basis of color in violation of the Fifteenth Amendment. This raises a substantial constitutional question not in issue in *McDonald*. See *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960); *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

Since petitioners are absolutely denied the right to vote and since the Pennsylvania statute draws lines on the basis of wealth and race, the Pennsylvania statute, unlike the Illinois statute in *McDonald*, must be tested by the compelling state interest test.

Even if, however, the Pennsylvania statute is not tested by the compelling state interest test, it must nevertheless be declared unconstitutional because of yet a third distinction between this case and *McDonald*. The *McDonald* Court, applying the reasonableness test, upheld the Illinois absentee ballot statute on the ground that it was "remedial" in nature, that is, it extended absentee ballot coverage to some but did not deny coverage to any eligible voter. 394 U.S. at 809-11. The Pennsylvania statute, on the other hand, is not "remedial" in nature since it expressly denies coverage to petitioners. This important statutory distinction raises a substantial constitutional question not foreclosed by *McDonald*.

II. Petitioners' case constitutes a case or controversy under Article III of the Constitution.

The District Court found that there was no adversity of interests between petitioners and all defendants because the Commonwealth defendants admitted that the laws of Pennsylvania unconstitutionally deprived petitioners of their right to vote. However, the Philadelphia defendants made no such admission and have vigorously defended this case on the merits in all courts. Thus, adversity of interest remains between petitioners and the Philadelphia defendants notwithstanding the admission of the Commonwealth defendants. Moreover, this Court has held that the admission of liability by a defendant does not operate to divest a federal court of jurisdiction. *Re Metropolitan Railway Receivership*, 208 U.S. 90 (1908).

The District Court also dismissed the petitioners' complaint because it lacked expertise to frame a remedy. However, even assuming there might be some difficulty in framing a remedy, this is not a sufficient basis for dismissing the complaint. A federal court sitting in equity has broad remedial powers and has the duty to remedy the deprivation of constitutional rights. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

Finally, the District Court dismissed petitioners' case because the defendant Attorney General had not issued a formal Attorney General's Opinion to the Philadelphia defendants. This can have no effect on petitioners' case since, notwithstanding the Attorney General's conduct, petitioners remain unconstitutionally deprived of their right to vote.

ARGUMENT

I.

PETITIONERS' CASE PRESENTS SUBSTANTIAL CONSTITUTIONAL QUESTIONS WHICH REQUIRE THE CONVENING OF A THREE-JUDGE COURT SINCE PETITIONERS' COMPLAINT ALLEGES THAT THEY AND OTHER PRETRIAL DETAINEES IN PHILADELPHIA COUNTY ARE ABSOLUTELY DENIED THE RIGHT TO VOTE BY THE COMMONWEALTH OF PENNSYLVANIA

Petitioners moved in the District Court pursuant to 28 U.S.C. § 2281 for the empanelling of a three-judge court. Although the District Court specifically did not rule on this motion and dismissed petitioners' complaint for lack of subject-matter jurisdiction, the Court of Appeals affirmed the District Court's dismissal of the complaint, without discussion of the jurisdictional issue, on the ground that petitioners were not entitled to a three-judge Court. Relying on *Bailey v. Patterson*, 369 U.S. 31 (1962), the Court of Appeals held that the substantive constitutional challenge of petitioners' complaint was wholly insubstantial in view of *McDonald v. Board of Elections*, 394 U.S. 802 (1969).[5]

---

[5] The Court of Appeals did not find that petitioners' case failed to satisfy any other requirement for the empanelling of a three-judge Court. Indeed, petitioners' case clearly meets these other requirements since their complaint challenges state statutes of general application and statewide concern, the complaint seeks an injunction against the enforcement of these statutes, and the actions of both state officers and local officers performing state functions are sought to be enjoined.

Moreover, it should also be noted that the Court of Appeals not only decided that petitioners were not entitled to a three-judge Court, but also held that the statutes in question were constitutional. As Judge Adams noted in his dissenting opinion

In *Bailey* and in several other cases, this Court has established that a statute is not challenged upon the ground of unconstitutionality within the meaning of 28 U.S.C. § 2281 where the claim of unconstitutionality is (1) "essentially fictitious" or "legally speaking non-existent," or (2) is "frivolous" because of prior decisions. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *California Water Service Co. v. City of Redding*, 304 U.S. 252, 254 (1938); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933).

In *Ex Parte Poresky*, 290 U.S. 30, 32 (1933) the Court expressed this rule as follows:

> The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' (citations omitted).

Accordingly, the issue before this Court is whether the *McDonald* decision so clearly forecloses the constitutional questions raised by petitioners' complaint and leaves no room for the inference that these questions can be the subject of controversy. Petitioners contend that the constitutional issues of their case are clearly not foreclosed by *McDonald*.

In *McDonald*, appellants were a class of untried pretrial detainees in Cook County, Illinois, who were already registered to vote and who sought to vote only by absentee ballot. Appellants made a timely application for

---

(A. 94), the Court of Appeals by this decision has exceeded its proper adjudicatory role and usurped the function of a three-judge Court. *Goosby v. Osser*, 452 F.2d at 41.

an absentee ballot to the Cook County Board of Election Commissioners, but the Board denied their application on the ground that appellants did not fall within those groups which the Illinois Election Code specifically permitted to vote by absentee means.[6]

Appellants then filed a complaint alleging that the provisions of the Illinois Election Code denied them equal protection of the law by not including them within the groups allowed to vote by absentee ballot. Appellants claimed that they were denied equal protection because the Illinois Election Code (1) did not provide for an absentee ballot for one "judicially incapacitated," but made it available to one "medically incapacitated" and (2) did not provide for an absentee ballot for appellants, but made it available to pretrial detainees who were residents of Cook County incarcerated outside of Cook County.

The threshold question confronting this Court was "how stringent a standard to use in evaluating the classifications made [by the Illinois' absentee provisions] and whether the distinctions must be justified by a compelling state interest . . . ." 394 U.S. at 806. In resolving this question, the Court recognized that its previous decisions required the application of the more stringent compelling state interest test in either of two situations:

---

[6]The Illinois absentee voting statute, Ill. Rev. Stat., c. 46, §§19-1 to 19-3, made absentee balloting available to four classes of persons: (1) those who were absent from their county of residence for any reason; (2) those who were "physically incapacitated"; (3) those whose observance of a religous holiday prevented attendance at the polls; and (4) those who served as poll watchers in precincts other than their own on election day. 394 U.S. at 803-04.

(1) if the appellants' right to vote were infringed, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); or

(2) if the statutory classifications were drawn on the basis of wealth or race, *Harper v. Virginia Board of Elections, supra; McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Douglas v. California*, 372 U.S. 353 (1963). 394 U.S. at 807.

The Court found, however, that appellants' case did not fall within either of these two situations.

First, with respect to the infringement of appellants' right to vote, the Court said, at page 807-08:

> . . . [t]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots . . . . Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.

Second, with respect to the nature of the classifications drawn by the Illinois statute, the Court said that the "exacting approach" was not necessary since "the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race." 394 U.S. at 807.

Additionally, the Court noted, in footnote 7 on page 808, that it would not reach appellants' contentions that they were the recipients of an impermissible consequence of pretrial detention and were being denied their right to vote solely because of their inability to post bail,

contrary to *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), "[s]ince there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State . . . . "

Having resolved the threshold question in this manner, the Court tested the Illinois absentee ballot provisions by the usual standards applicable when a fundamental right is not in issue. The Court said that the statutory classifications must be upheld if they bear a reasonable relationship to a legitimate state end. 394 U.S. at 808-09. The Court then found that it was reasonable to treat the appellants differently from the medically handicapped and from those incarcerated outside of Cook County, 394 U.S. at 809-10, and concluded that it was "satisfied . . . that appellants' challenge to the allegedly unconstitutional incompleteness of Illinois' absentee voting provisions cannot be sustained." 394 U.S. at 810.

In summary, then, the Court held in *McDonald:*

(1) that it would not apply the compelling state interest test to appellants' challenge to the Illinois absentee ballot statute (a) because appellants' could not show that they were absolutely denied the right to vote but only that they were denied the use of an absentee ballot and (b) because the Illinois absentee ballot laws were not drawn on the basis of race or wealth; and

(2) that the Illinois absentee ballot laws reasonably discriminated against appellants in favor of the medically incapacitated and pretrial detainers incarcerated outside of Cook County.

Petitioners contend for several reasons that their case is factually and legally distinguishable from *McDonald* and presents substantial constitutional questions unanswered by *McDonald.* Indeed, petitioners' case raises some

questions clearly left open by *McDonald* and other questions not in issue in *McDonald*.

First Distinction – Petitioners, unlike the *McDonald* appellants, are absolutely denied the right to vote.

Petitioners' are a class of untried pretrial detainees in Philadelphia County, Pennsylvania, many of whom seek not only to vote but to register to vote. Petitioners sought to register and to vote not only by absentee means, but also by various other means including appearance by proxy, by requesting that the election officials bring polling booths and registration facilities to prisons, by requesting permission to go personally to polling places, by guarded transportation if necessary, and generally by any means which the defendant election officials deemed advisable to utilize. Since both the Commonwealth and Philadelphia defendants refused all of petitioners' attempts to register and to vote, petitioners are absolutely denied the right to vote. (Complaint, ¶s30-34, 47-56, 59, A. 17-18 and 20-21).[7]

---

[7] In the present procedural posture of petitioners' case, the allegations of their complaint must be deemed to be true. *Boddie v. Connecticut*, 401 U.S. 371, 373 (1971); *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 601 (1966); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933).

In *Gomillion*, the lower courts dismissed the plaintiffs' contention that their right to vote was being infringed on the basis of race in violation of Fourteenth and Fifteenth Amendments on the grounds of lack of jurisdiction and failure to state a claim. In ruling on the propriety of the dismissal, this Court said, at page 341:

> At this stage of the litigation we are not concerned with the truth of the allegations, that is, the ability of petitioners to

Indeed, at no time during this litigation has any respondent disputed that petitioners are absolutely denied the franchise. Rather, the Philadelphia defendants have vigorously contended in all the proceedings below that, notwithstanding this absolute denial, the laws of Pennsylvania are constitutional.

In view of this total denial of the franchise, the following consequences, specifically recognized by *McDonald*, result:

(1) the classifications drawn by the challanged Pennsylvania statutes must be tested by the compelling state interest test, 394 U.S. at 807-08;

(2) petitioners' claim that they are the recipients of an impermissible consequence of pretrial detention in violation of due process of law must be addressed by the courts, 394 U.S. at 808, footnote 7; and

(3) petitioners' claim that they are being denied the right to vote because they cannot afford bail, contrary to *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), must also be addressed by the courts, 394 U.S. at 808, footnote 7.

Since these three consequences flow from the absolute denial of the franchise to petitioners, it is clear for this reason alone that petitioners' case is not foreclosed or rendered frivolous by *McDonald*.

Further, it must be also noted that the substantiality of the constitutional questions raised by this case cannot

---

sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution.

be doubted in view of decisions by this Court subsequent to *McDonald*. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), *Evans v. Cornman*, 398 U.S. 419 (1970), *Kramer v. Union Free School District*, 395 U.S. 621 (1969) and *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court applied the compelling state interest test to statutes challenged by plaintiffs who were absolutely prohibited by their states from voting.

In *Dunn*, the Court held that Tennessee's durational residency requirements, which restricted voting to citizens who lived in the state for one year and in a country for three months, were unconstitutional since they served no compelling state interest and placed an impermissible burden on interstate travel.

Similarly, in *Evans*, the court declared that Maryland could not deny the vote to individuals who resided in federal enclaves within the State.

In *Kramer*, *Cipriano*, and *Kolodziejski* the Court declared that laws which prohibited non-property owners from voting in certain local elections were unconstitutional even though the non-property owners were not denied the right to vote in state and federal elections.

Moreover, in *Bullock v. Carter*, 405 U.S. 134 (1972), the Court recently had the opportunity to address and comment upon a situation where a state tied the right to vote to the affluence of the voter. In *Bullock* the Court was confronted with a claim by a candidate that the filing fee requirements imposed on candidates by Texas law constituted a denial of equal protection of the law. The threshold question for the Court was whether the compelling state interest test or the any rational basis test should be applied to the Texas filing fee system. The

Court found that the more rigid standard of review applied because, *inter alia*, the filing fee requirement had the "liklihood" of denying to some voters the opportunity to vote for a candidate of their choice because of their lack of affluence. 405 U.S. at 144. Tested by this more stringent standard, the Court declared the filing fee unconstitutional.

Petitioners' case is even more compelling than *Bullock* since the impact of the Pennsylvania statutes on petitioners' right to vote is more direct and more clearly related to petitioners' lack of affluence than was the impact of the Texas filing fee system. Petitioners' case is also more compelling than the *Kramer, Kolodziejski* and *Cipriano* cases since the plaintiffs in those cases were only disenfranchised in certain local elections whereas petitioners are disenfranchised in all elections, federal, state and local.

Finally, it should also be noted that there have been several lower court cases since *McDonald*, both state and federal, which have recognized that due process requires that a pretrial detainee not be deprived of any rights except those inherently related to his confinement.[8]

---

[8] *Moore v. Ciccone*, 459 F.2d 574 (8th Cir. 1972) (delay, censorship and reading of incoming mail from attorney); *Anderson v. Nosser*, 438 F.2d 183 (1971), *modified* 456 F.2d 835 (5th Cir. 1972) (inadequate hygienic facilities); *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971) (inadequate hygienic facilities); *Jones v. Wittenberg*, 323 F. Supp. 93 and 330 F. Supp. 707 (N.D. Ohio 1971) *aff'd sub nom., Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972) (inadequate hygienic and other facilities); *Conklin v. Hancock*, 334 F. Supp. 1119 (D. N.H. 1971) (delay, censorship and reading of incoming and outgoing correspondence with attorney); *Davis v. Lindsay*, 321 F. Supp. 1134 (S.D. N.Y. 1970) (solitary confinement of pretrial detainee unconstitutional); *Palmigiano v. Travisono*, 317 F. Supp. 776 (D. R.I. 1970) (reading

These cases also serve to highlight the substantiality of petitioners' constitutional claims.

Second Distinction – The Pennsylvania absentee voting statute, unlike the Illinois statute challenged in *McDonald*, draws lines on the basis of wealth and race.

The Illinois absentee ballot statute challenged in *McDonald* made absentee ballots available to four classes of persons and did not expressly deny an absentee ballot to any eligible voter. Although the *McDonald* appellants contended that this statute drew lines on the basis of wealth and therefore should be tested by the compelling state interest test, the Court rejected this contention finding that the statute was not so drawn. 394 U.S. at 807.

The Pennsylvania absentee ballot statute, on the other hand, does not merely fail to include petitioners in the class of eligible absentee voters, but rather specifically excludes them. The statute defines "qualified absentee elector" to include twelve classes of persons and then provides: "... That the words 'qualified absentee elector' shall in nowise be construed to include persons confined in penal institution or a mental institution nor shall it in anywise be construed to include a person not qualified as a qualified elector...." 25 Purdon's Statutes §2602(w)(1)-(12).[9]

---

of all outgoing and incoming mail); *Tyler v. Ciccone*, 299 F. Supp. 685 (W.D. Mo. 1969) (censorship and confiscation of manuscript); *Wayne County Jail Inmates v. Wayne County Board*, No. 173217, Wayne County Circuit Court, May 18, 1971 (inadequate hygienic facilities).

[9] For the complete text of this statute, see Appendix to Brief, pp. 9a-11a.

For the following reasons, petitioners contend that this statute does draw lines on the basis of wealth and race and must, as specifically recognized in *McDonald*, be tested by the compelling state interest test.

This Court has long applied the principle that statutes which draw classifications on the basis of wealth or race are "inherently suspect" and require an overriding state interest to be sustained. *McDonald v. Board of Elections*, 394 U.S. 802, 807 (1969); *Hunter v. Erickson*, 393 U.S. 385, 389, 391-92 (1969) (housing ordinance regulating sale and lease of land based on race or religion must be approved by majority of voters at election); *McLaughlin v. Florida*, 379 U.S. 184, 191-93 (1964) (prohibition of interracial cohabitation); *Douglas v. California*, 372 U.S. 353, 355-58 (1963) (right to counsel on appeal); *Brown v. Board of Education*, 347 U.S. 483 (1954) (segregation in public schools); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (segregation in public schools); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (restrictions on persons of Japanese ancestry); *Edwards v. California*, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring) (misdemeanor to bring indigent into state).

This principle was first applied by the Court to statutes which explicitly classified by race or wealth, *Bolling v. Sharpe, supra, Brown v. Board of Education, supra, Korematsu v. United States, supra*, or which, though not explicitly classifying by race or wealth, were found to be obviously intended to have such an effect. See *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (redistricting measure a device to disenfranchise black citizens).[10]

---

[10]See *Michelman, The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 20-21 (1969).

This principle has more recently been applied by the Court to statutes which, though not explicitly or purposely designed by legislatures to classify by race or wealth, in fact have that effect. *Bullock v. Carter*, 405 U.S. 134, 142-44 (1972) (filing fee for candidates invidiously discriminates against low income voters); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (indigents who cannot afford to pay fine may not be imprisoned beyond maximum term); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668-70 (1966) (poll tax invidiously discriminates against indigents); *Anderson v. Martin*, 375 U.S. 399, 403-04 (1964) (requiring designation of race of candidate on ballot unconstitutional); *Douglas v. California, supra; Griffin v. Illinois*, 351 U.S. 12, 16-18 (1956) (transcript of criminal proceedings must be given without cost to indigent criminal defendants); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 432-33 (1971) (private employers may not adopt arbitrary barriers to employment which operate in fact to discriminate on the basis of race).[11] As this Court

[11]For lower court cases applying this principle, see *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) (failure to provide certain municipal services in black neighborhood); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968) (displacement by urban renewal project based on race); *Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967) *aff'd sub nom., Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (disparate educational facilities based on race and lack of affluence); *Serrano v. Priest*, 487 P.2d 1241, 1249-54 (Cal. 1970) (financing of public school system based on property taxes invidiously discriminates against poor); *cf. Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 988 (5th Cir. 1969) (private employer's seniority system discriminates on basis of race); *Johnson v. Pike Corp.*, 332 F. Supp. 490, 493 (C.D. Cal. 1971) (private employer's practice of discharging employees whose wages were garnished discriminates against minorities); *Gregory v. Litton*

said in *Griffin*, and recently reaffirmed in *Williams*, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin v. Illinois, supra*, at 17 n. 11; *Williams v. Illinois, supra* at 242.

The Pennsylvania statute attacked by petitioners, although not explicitly or designedly discriminatory on the basis of wealth or race, is grossly discriminatory *in fact* both on the basis of race *and* wealth and must be strictly scrutinized in order to pass constitutional muster. The line drawn by the statute is between those confined in penal institutions and those not confined in penal institutions who qualify for an absentee ballot. As petitioners allege, and can prove, this line has the effect of discriminating against both racial minorities and indigents because over 90 percent of petitioners' class is "non-white" and indigent. The impact of the line drawn by the Pennsylvania statute is thus clearly distinguishable from the line drawn by the statute in *McDonald*. The Illinois statute merely drew a line between four classes of voters eligible to vote by absentee ballot and all others, white and black, poor and affluent, who could not vote by absentee ballot.

Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (private employer's policy of excluding from employment persons who have a number of arrests without convictions discriminates against black job applicants).

See generally *Michelman, supra* note 10, at 21, 24-27; *Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 Stan. L. Rev. 767, 774 (1969); *Goldberg, Equality and Governmental Action*, 39 N.Y.U.L. Rev. 205, 221 (1964); Coons, Clune & Sugarman, *Educational Opportunity, A Workable Constitutional Test for State Financial Structures*, 57 Calif. L. Rev. 305, 358-61 (1969).

Moreover, it should be noted that petitioners' contention that they are denied the right to vote on the basis of race raises constitutional and statutory questions which were not raised in the *McDonald* case and which were not, therefore, before the Court. Unlike the *McDonald* appellants, petitioners allege that their right to vote is being infringed on the basis of race in violation of the Fifteenth Amendment and the Voting Rights Act of 1965. The substantiality of these questions is apparent from decisions of this Court. In *Lane v. Wilson*, 307 U.S. 268, 275 (1939), the Court said:

> The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race of color, has been amply expounded by prior decisions. *Guinn v. United States*, 238 U.S. 347; *Myers v. Anderson*, 238 U.S. 368. *The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.* (emphasis added).

See also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

For these additional reasons, therefore, petitioners' case presents constitutional questions not foreclosed by *McDonald*.

Third Distinction – Even if the classifications drawn by the Pennsylvania absentee voting statute are not tested by the compelling state interest test, there are significant differences between *McDonald* and petitioners' case which raise a substantial constititonal question as to whether the Pennsylvania statute invidiously discriminates against petitioners.

As noted above, the Illinois statute in *McDonald* extended the right to vote by absentee ballot to four classes of voters and did not expressly deny an absentee ballot to anyone. The *McDonald* court, in applying the test of reasonableness to this statute, emphasized that the alleged unconstitutional deficiency of the statute was its failure to include appellants in its remedial provisions. The Court said that such "remedial" legislation, *i.e.*, legislation which in the voting context extends the franchise, cannot be considered unconstitutional simply because it fails to go far enough. 394 U.S. at 809-11.[12] The Court further commented that the Illinois legislature should be commended for adding groups to the absentee ballot coverage as those groups came to the legislature's attention and that legislatures are entitled to take reform one step at a time and need not strike at all evils at the same time. 394 U.S. at 809 and 811.

The Pennsylvania statute, on the other hand, because it specifically excludes petitioners from the class of qualified absentee electors cannot be considered a "remedial" statute vis-a-vis petitioners. Unlike the Illinois legislature, the Pennsylvania legislature has not merely

---

[12]For a discussion of this aspect of *McDonald*, see *Note, Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 84-86 (1969).

failed to include petitioners in remedial legislation but rather has affirmatively taken steps to exclude petitioners. Nevertheless, the legislature has extended absentee voting privileges over the years to numerous other classes, including members of the military and the Merchant Marine, members of religious or welfare groups serving the armed forces, civilian employees of the United States, those who are absent from the county of their residence because of their duties, occupation or business, the spouses and dependents of the preceding groups, those who are ill or physically disabled, and bedridden war veterans. 25 Purdon's Statutes § 2602(w)(1)-(12). Until 1963, Pennsylvania had extended absentee voter privileges only to the ill and those absent from their counties on business, while specifically disqualifying those "committed to and confined in a penal institution." In 1963, the statute was amended to extend its remedial provisions to additional classes, as specified above, but the disqualification applicable to petitioners remained intact. In fact, the specific statutory words disqualifying petitioners from absentee ballot coverage were changed slightly by the elimination of the words "committed to." This is a clear indication that the legislature was intentionally reaffirming its policy in this area as to petitioners.

Given this important statutory distinction, even if the compelling state interest test is not applied to the Pennsylvania absentee ballot statute, the statute will not survive the test of reasonableness as applied in *McDonald*. At the very least, it is clear that the Pennsylvania statute is subject to an analysis different than the one by which the *McDonald* Court analyzed the Illinois statute. Accordingly, it must be concluded for this reason also that petitioners' case raises substantial constitutional questions unanswered by *McDonald*.

II.

PETITIONERS' CASE CONSTITUTES A CASE OR CONTROVERSY UNDER ARTICLE III OF THE CONSTITUTION

The District Court, *sua sponte*, dismissed petitioners' complaint for lack of subject matter jurisdiction on the ground that petitioners' case did not constitute a case or controversy with the meaning of Article III of the Constitution. On appeal, the Court of Appeals affirmed the District Court without discussion. *Goosby v. Osser*, 452 F.2d 39 (1971). Consequently, in order for petitioners to obtain the hearing which they seek before a three-judge court, it is necessary for this Court to find not only that petitioners' complaint presents substantial constitutional questions, but also that petitioners' case constitutes a case or controversy within the meaning of Article III of the Constitution.

The District Court appears to have held that petitioners' case failed to constitute a case or controversy for the following three reasons:

1. Since the Commonwealth defendants admitted that the laws in question unconstitutionally deprived petitioners of their right to vote, there is no adversity of interests between petitioners and all defendants.

2. Specific or conclusive relief is not available to petitioners because the District Court lacked expertise to frame a plan of registration or voting.

3. Since the Attorney General of Pennsylvania has not issued a formal Attorney General's Opinion to guide the Philadelphia defendants in this matter, the Philadelphia defendants have no legal standing to defend this law suit and therefore this case is hypothetical or not ripe as to them.

For the following reasons, however, the decision of the District Court is in error.

1. Adversity of interests between parties.

Notwithstanding the admission of the Commonwealth defendants, adversity of interests between petitioners and all defendants remains for two readily apparent reasons.

First, the Philadelphia defendants have made no admission and in fact have vigorously contended in all the proceedings below (1) that they are not bound by any admissions or opinions of the Attorney General and (2) that the laws of Pennsylvania do not unconstitutionally deprive petitioners of their right to vote. Thus, adversity of interests between petitioners and the Philadelphia defendants clearly remains.

Second, even assuming that the Philadelphia defendants were bound by the admission of the Commonwealth defendants, the reasoning and result of the District Court has been expressly rejected in a similar case by this Court. *Re Metropolitan Railway Receivership*, 208 U.S. 90 (1908). In this case the Court held that there was a case or controversy even though the defendant admitted the claims of the plaintiff and consented to the relief requested. The Court reasoned that since demand for relief was made and refused prior to institutions of the suit,

> [t]here was therefore an unsatisfied demand made by complainants and refused by defendant at the time of the filing of the bill. We think that where there is a justiciable claim of some right . . . which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties. . . . It is not necessary that the

> defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal court has no jurisdiction of an action brought to enforce it. 208 U.S. at 107-108.

The reasoning of *Metropolitan Railway* is equally applicable to petitioners' case. Petitioners made several demands for relief of all defendants prior to commencing suit. These demands were and remain unsatisfied since, notwithstanding the admission, petitioners are still unable to register and vote. Therefore, adversity of legal interest between petitioners and defendants remains until petitioners' demands are satisfied by consent decree or court order.

Moreover, it should be noted that if the rule were otherwise a defendant could have an action against him dismissed merely by admitting liability or fault. The Court would then lose jurisdiction over the case and the plaintiff would be without redress for his injury. *Re Metropolitan Railway Receivership, supra,* at 108. In *Walling v. Helmerich and Payne, Inc.,* 323 U.S. 37 (1944), where the defendant voluntarily discontinued an alleged illegal practice, this Court found that nevertheless there was a case or controversy, noting that "the defendant would presumably be free to resume the use of the illegal plan were not some effective restraint made." *Id.* at 43. Here, despite the Commonwealth defendants' admission, they did not voluntarily cease the illegal practice and continue, for whatever reasons, to deny petitioners the right to register and vote. Petitioners will obtain relief only by a binding court order.

2. Availability of Relief

The District Court held that it lacked expertise to formulate a plan of registration and voting, and, therefore, could not afford petitioners specific relief. An action does not, however, lose its stature as a case or controversy under Article III simply because of possible difficulty in framing relief. A court of equity is endowed with broad remedial powers and any difficulty it may have in formulating a remedy where rights have been infringed will not justify dismissal of a case. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955); *Lewis v. Kugler*, 446 F.2d 1343, 1352 (3d Cir. 1971). As the above-cited cases recognized, federal district courts have broad powers to remedy the deprivation of constitutional rights. Indeed, this Court has said that courts not only have the power, but the duty, to remedy discriminatory practices. *Louisiana v. United States, supra*, at 154. If the District Court felt the need for guidance as to remedy it could have asked for expert testimony, which the petitioners were and are ready to present, or it could have asked the parties to submit proposals to it. Indeed, the prayer for relief in petitioners' complaint (A. 24) sets forth specific steps for implementing voting and registration procedures for petitioners.

Accordingly, even given the District Court's concern for appropriate remedies, dismissal of petitioners' case was not proper. The District Court could clearly grant specific relief of a conclusive nature to petitioners by enjoining defendants from continuing to refuse to allow petitioners to register and vote.

3. Hypothetical Nature of the Case

The District Court found that since the Commonwealth defendants admitted the unconstitutionality of the challenged statutes but did not issue a formal Attorney General's Opinion on the subject to the Philadelphia defendants, the Philadelphia defendants, by resisting petitioners' case, were, in effect, asking the Court to render an advisory opinion before the Attorney General had issued his own formal opinion. It is clear, however, that the absence of an Opinion of the Attorney General neither transforms petitioners' plight into an abstract situation nor fails to make it any less a present, existing deprivation of constitutional rights. The Attorney General of Pennsylvania is not required to issue Opinions and throughout all the proceedings in this case the Philadelphia defendants have steadfastly maintained that they are independent officials not bound by the opinions and admissions of the Attorney General.[13]

---

[13] A month before the institution of this case, the Attorney General issued an Opinion regarding student registration in Pennsylvania. The Philadelphia defendants refused to follow the procedures outlined in that Opinion. When a class action was brought on behalf of the students, the Philadelphia defendants signed a consent decree. A specific provision of that decree recites that the Philadelphia defendants do not admit or recognize by entering into a consent decree that they are bound by the Opinions of the Attorney General. *Fair v. Osser*, Civil Action No. 71-2212, Eastern District of Pennsylvania, Stipulation and Order dated September 27, 1971.

CONCLUSION

For all of the foregoing reasons petitioners respectfully request that the judgment, opinion and order of the Court of Appeals be reversed because (1) the Court of Appeals erroneously held that petitioners' case is wholly insubstantial in view of *McDonald v. Board of Elections*, and (2) the Court of Appeals erroneously affirmed the District Court's dismissal of petitioners' complaint for lack of subject-matter jurisdiction. Petitioners respectfully request that the Court remand the case to the Court of Appeals with instructions to remand to the District Court for the empanelling of a three-judge Court.

ANN S. TORREGROSSA
JOSEPH A. TORREGROSSA
ELLIOT B. PLATT
JONATHAN M. STEIN
LAURENCE M. LAVIN
Attorneys for Petitioners

Of Counsel:
DONALD A. GIANNELLA
GREGORY M. HARVEY

On the Brief:
Allan H. Lawson

DATED: August 28, 1972

APPENDIX TO BRIEF

UNITED STATES CONSTITUTION

Article I, Section 2, Clause 1

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifteenth Amendment

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Twenty-Fourth Amendment

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay a poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

UNITED STATES CODE

Title 28, Section 2281

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title.

Title 28, Section 2284(1)

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

Title 42, Section 1971(a)(1) and (a)(2)(A)

(a)(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servititude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall–

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practicies, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote

. . .

Title 42, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

PENNSYLVANIA CONSTITUTION

Article I, Section 5

Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Article VII, Section 4

All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided; That secrecy in voting be preserved.

PENNSYLVANIA ELECTION LAWS

First Class City Permanent Registration Act,
25 Purdon's Statutes §623-1 et seq., in relevant part

Section 623-20(a)

(a) Every person claiming the right to be registered as an elector must appear in person before the commission, a commissioner, a clerk or employee of the commission acting as registrar or a registrar at the main office of the commission, or at such other office or place as the commission shall have designated, and answer the questions required to be asked in accordance with this act.

Every person claiming the right to be registered as an elector who is physically disabled so that he cannot appear in person to be registered may request, in writing, that the registration commission send a registrar to the residence of such person for the purpose of registering such person in the same manner as required by law of other persons appearing for registration. The letter

requesting such registration shall be accompanied by a statement of the physician attending such person, stating that such person is physically disabled to the extent that such person is unable to appear at any of the established places for registration. Upon receipt by the registration commission of such a letter duly accompanied by the required physician's statement, the registration commission shall direct one of its registrars to go to the residence of such disabled person and register him or her, as the case may be.

Section 623-20.2(a),(d),(e)

In addition to any other method herein provided, the following persons may also be registered in the manner hereinafter set forth under this section: (1) any person in military service, his spouse and dependents; or (2) any person in the Merchant Marine, his spouse and dependents; or (3) any person in religious and welfare groups officially attached to and serving with the Armed Forces, his spouse and dependents; or (4) any person who is a civilian employee of the United States outside the territorial limits of the several states of the United States and the District of Columbia, whether or not such person is subject to the civil service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, his spouse and dependents.

(a) He may make application to the commission for a registration card. The commission is hereby authorized to consider a request for an absentee ballot from any person enumerated in this section as an application for a registration card and to cause to be forwarded to any such person, together with his absentee ballot and balloting material, a registration card in duplicate to be completed and sworn to or affirmed prior to or concurrently with the time of voting the absentee ballot . . .

(d) Upon written application by any person who may register under the provisions of this section to the registration commission having jurisdiction in the city in which the applicant resided on the date of leaving his home residence, a registration card, in the form herein prescribed, in duplicate, shall be mailed to the applicant at the address given in such application. Such person shall thereupon supply the information required on the registration card, in duplicate, and shall take the affidavit thereto, in duplicate, in the presence of any person authorized to administer oaths, and shall mail the same, in duplicate, to the registration commission from which it was procured.

(e) Registration in the manner prescribed for by persons registering under this section may be made at any time.

Section 623-20.3(a),(d),(e)

Any elector who is unable to appear in person to register because of illness or physical disability may, in addition to any other method herein provided, also be registered in the following manner:

(a) He may make application to the commission for a registration card.

(d) as in section 623-20.2(d), *supra.*

(e) as in section 623-20.2(e), *supra.*

Section 623-21

Every person who shall possess all the qualifications of an elector as provided in the Constitution and laws of this Commonwealth, or who by continued residence in his election district will obtain such qualifications before the

next ensuing general or municipal election, shall be entitled to be registered as herein provided, and no person shall be permitted to vote at any election or primary held in such city unless he shall have been so registered, and no elector so registered shall be required to register again for any election or primary while he continues to reside at the same address, or has removed his residence to another address in the same district and has filed a removal notice as provided by this act, unless his registration is cancelled by the commission by reason of his failure to vote during the certain period as hereinafter provided, or for any other reason under the provisions of this act.

Section 623-38, in part

(a) Any person whose registration affidavit appears in the district register of any election district in the city, and who, upon applying to vote, shall have signed his name to a voter's certificate, in the form hereinafter provided, as a means of identification, and whose signature thereon shall have been compared by the election officers in the presence and view of the watchers, with the signature of the applicant as recorded in the district register and shall have been deemed authentic by said election officers, shall be entitled to vote in such district at any general, municipal or special election, unless it be shown to the satisfaction of the election officers that he has become disqualified by removal from the district since registration, or that he has violated any law of this Commonwealth prohibiting bribery at elections . . .

Pennsylvania Election Code, 25 Purdon's Statutes §2602 (w)(x)(y)(z-1) and (z-3) in part

(w) The words "qualified absentee elector" shall mean:

(1) Any qualified elector who is or who may be in the military service of the United States regardless of whether at the time of voting he is present in the election district of his residence or is within or without this Commonwealth and regardless of whether he is registered or enrolled; or

(2) Any qualified elector who is a spouse or dependent residing with or accompanying a person in the military service of the United States if at the time of voting such spouse or dependent is absent from the State or county of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; [1] or

(3) Any qualified elector who is or who may be in the service of the Merchant Marine of the United States if at the time of voting he is absent from the State or county of his residence. . . .; or

(4) Any qualified elector who is a spouse or dependent residing with or accompanying a person who is in the service of the Merchant Marine of the United States if at the time of voting such spouse or dependent is absent from the State or county of his residence . . . .; or

---

[1] The clause of this subsection commencing with "Provided, however" is repeated in subsections (3) through (8) which follow and will be omitted therefrom.

(5) Any qualified elector who is or who may be in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting he is absent from the State or county of his residence . . . .; or

(6) Any qualified elector who is a spouse or dependent residing with or accompanying a person in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting such spouse or dependent is absent from the State or county of his residence . . . .; or

(7) Any qualified elector who is or who may be a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such elector is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, if at the time of voting he is absent from the State or county of his residence . . . .; or

(8) Any qualified elector who is a spouse or dependent residing with or accompanying a person who is a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia whether or not such person is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress if at the time of voting such spouse or dependent is absent from the State or county of his residence . . . .; or

(9) Any qualified war veteran elector who is bedridden or hospitalized due to illness or physical disability if he is absent from the Commonwealth or county of his residence and unable to attend his polling place because

of such illness or physical disability regardless of whether he is registered and enrolled; or
As amended 1968, Dec. 11, P.L. __, No. 375, §1.

(10) Any qualified, registered and enrolled elector who expects to be or is absent from the Commonwealth or county of his residence because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election; or
As amended 1968, Dec. 11, P.L. __, No. 375, §1.

(11) Any qualified, registered and enrolled elector who is unable to attend his polling place because of illness or physical disability; or

(12) Any qualified, registered and enrolled elector who is a spouse or dependent accompanying a person employed in the service of this Commonwealth or in the service of the Federal Government within the territorial limits of the several States of the United States and the District of Columbia in the event the duties, profession or occupation of such person require him to be absent from the Commonwealth or county of his residence:

Provided, however, That the words "qualified absentee elector" shall in nowise be construed to include persons confined in a penal institution or a mental institution nor shall it in anywise be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition set forth in section 102(t) of this act.
As amended 1963, Aug. 13, P.L. 707, §1.

(x) The words "members of the merchant marine of the United States" mean persons (other than persons in military service) employed as officers or members of crews of vessels documented under the laws of the United States or of vessels owned by the United States or of

vessels of foreign flag registry under charter to or control of the United States, and persons (other than persons in military service) enrolled with the United States for employment or for training for employment or maintained by the United States for emergency relief service as officers or members of crews of any such vessels, but does not include persons so employed or enrolled for such employment or for training for employment or maintained for such emergency relief on the Great Lakes or the Inland waterways. As amended 1963, Aug. 13, P.L. 707, §1.

(y) The word "dependent" means any person who is in fact a dependent. Added 1963, Aug. 13, P.L. 707, §2

. . . .

(z-1) The words "in military service" shall mean the uniformed services as defined in section 102 of the Career Compensation Act of 1949 (63 Stat. 804, U.S. Code, Title 37 Par. 231). Added 1963, Aug. 13, P.L. 707, §2

. . . .

(z-3) The words "duties, occupation or business" shall include leaves of absence for teaching or education, vacations, sabbatical leaves, and all other absences associated with the elector's duties, occupation or business, and also include an elector's spouse who accompanies the elector. Added 1968, Dec. 11, P.L. __, No. 375, §3.

The Permanent Registration Act for Cities of the Second Class, Cities of the Second Class A, and Cities of the Third Class, Boroughs, Towns and Townships, 25 Purdon's Statutes §951-1 et seq., in relevant part

Section 951-18(a)

(a) Every person claiming the right to be registered as an elector must appear in person before the commission, a commissioner, a registrar, or a clerk, at the office of the commission, or at such other place as the commission shall have designated, and answer the questions required to be asked in accordance with this act.

Every person claiming the right to be registered as an elector who is physically disabled so that he cannot appear in person to be registered may request, in writing, that the registration commission send a registrar to the residence of such person for the purpose of registering such person in the same manner as required by law of other persons appearing for registration. The letter requesting such registration shall be accompanied by a statement of the physician attending such person, stating that such person is physically disabled to the extent that such person is unable to appear at any of the established places for registration. Upon receipt by the registration commission of such a letter duly accompanied by the required physician's statement, the registration commission shall direct one of its registrars to go to the residence of such disabled person and register him or her, as the case may be.

Section 951-18.1(a), (d), (e)

In addition to any other method herein provided, the following persons may also be registered in the manner hereinafter set forth under this section: (1) any person in military service, his spouse and dependents; or (2) any person in the Merchant Marine, his spouse and depend-

ents; or (3) any person in religious and welfare groups officially attached to and serving with the armed forces, his spouse and dependents; or (4) any person who is a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such person is subject to the civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, his spouse and dependents.

(a) He may make application to the commission for a registration card. The Commission is hereby authorized to consider a request for an absentee ballot from any person enumerated in this section as an application for a registration card and to cause to be forwarded to any such person, together with his absentee ballot and balloting material, a registration card, in duplicate, to be completed and sworn to or affirmed prior to or concurrently with the time of voting the absentee ballot: Provided, however, That the envelope containing such executed duplicate registration cards shall bear a postmark no later than the day of the primary or election for which the absentee ballot is being voted and shall be received at the office of the commission no later than the date as provided by law for the canvassing of absentee ballots.

(d) Upon written application by any person who may register under the provisions of this section to the registration commission having jurisdiction in the city of the second class, city of the second class A, city of the third class, borough, town or township in which the applicant last resided on the date of leaving his home residence, a registration card, in the form herein prescribed, in duplicate, shall be mailed to the applicant at the address given in such application. Such person shall

thereupon supply the information required on the registration card, in duplicate, and shall take the affidavit thereto in duplicate in the presence of any person authorized to administer oaths, and shall mail the same, in duplicate, to the registration commission from which it was procured.

(e) Registration in the manner prescribed for by persons registering under this section may be made at any time.

Section 951-18.2(a),(d), (e)

Any elector who is unable to appear in person to register because of illness or physical disability may, in addition to any other method herein provided, also be registered in the following manner:

(a) He may make application to the commission for a registration card.

(d) as in section 951-18.1(d), *supra.*

(e) as in section 951-18.1(e), *supra.*

Section 951-19

Every person living in a city of the second class, city of the second class A, city of the third class, borough, town or township who shall possess all the qualifications of an elector as provided in the Constitution and laws of this Commonwealth, or who by continued residence in his election district will have obtained such qualifications before the next ensuing elections, shall be entitled to be registered as herein provided. From and after the first day of June, one thousand nine hundred fifty-five, no person shall be permitted to vote at any election or primary held in any city of the second class, city of the second class A,

city of the third class, borough, town or township unless he shall have been so registered, except by order of a court of common pleas as hereinafter provided; and no elector so registered shall be required to register again for any election or primary while he continues to reside at the same address, unless his registration is cancelled by reason of his failure to vote during a period of two years as hereinafter provided.

Section 951-36(a), in part

(a) Any person whose name is in the district register of any election district in any city of the second class, city of the second class A, city of the third class, borough, twon or township, and who, upon applying to vote, shall have signed his name and address to a voter's certificate, in the form hereinafter provided for, as a means of identification, and whose signature thereon shall have been compared by the election officers in the presence and view of the watchers, with the signature of the applicant as recorded in the district register and shall have been deemed authentic by said election officers, shall be entitled to vote in such district at any general, municipal or special election, unless it be shown to the satisfaction of the election officers that he has become disqualified by removal from the district since registration, or that he has violated any law of this Commonwealth prohibiting bribery at elections.

Pennsylvania Election Code, 25 Purdon's Statutes §3050 (a) and (d)

Section 3050

(a) At every primary and election each elector who desires to vote shall first sign a voter's certificate, and, unless he is a State or Federal employe who has registered under any registration act without declaring his residence by street and number, he shall insert his address therein, and hand the same to the election officer in charge of the district register. Such election officer shall thereupon compare the elector's signature on his voter's certificate with his signature in the district register. If, upon such comparison, the signature upon the voter's certificate appears to be genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote: Provided, That if the signature on the voter's certificate, as compared with the signature as recorded in the district register, shall not be deemed authentic by any of the election officers, such elector shall not be denied the right to vote for that reason, but shall be considered challenged as to identity and required to make the affidavit and produce the evidence as provided in subsection (d) of this section. When an elector has been found entitled to vote, the election officer who examined his voter's certificate and compared his signature shall sign his name or initials on the voter's certificate, shall, if the elector's signature is not readily legible, print such elector's name over his signature, and the number of the stub of the ballot issued to him or his number in the order of admission to the voting machines, and at primaries a letter or abbreviation designating the party in whose primary he votes shall also be enetered by one of the election officers or clerks. As each voter is

found to be qualified and votes, the election officer in charge of the district register shall write or stamp the date of the election or primary, the number of the stub of the ballot issued to him or his number in the order of admission to the voting machines, and at primaries a letter or abbreviation designating the party in whose primary he votes, and shall sign his name or initials in the proper space on the registration card of such voter contained in the district register.

As each voter votes, his name in the order of voting shall be recorded in two (2) numbered lists of voters provided for that purpose, with the addition of a note of each voter's party enrollment after his name at primaries.

(d) No person, except a qualified elector who is in actual military or naval service under a requisition of the President of the United States or by the authority of this Commonwealth, and who votes under the provisions of Article XIII of this act, shall be entitled or permitted to vote at any primary or election at any polling place outside the election district in which he resides, nor shall he be permitted to vote in the election district in which he resides, unless he has been personally registered as an elector and his registration card appears in the district register of such election district, except by order of the court of common pleas as provided in this act, and any person, although personally registered as an elector, may be challenged by any qualified elector, election officer, overseer, or watcher at any primary or election as to his identity, as to his continued residence in the election district or as to any alleged violation of the provisions of section 1210 of this act, and if challenged as to identity or residence, he shall produce at least one qualified elector of the election district as a witness, who shall make affidavit of his identity or continued residence

in the election district: Provided, however, That no person shall be entitled to vote as a member of a party at any primary, unless he is registered and enrolled as a member of such party upon the district register, which enrollment shall be conclusive as to his party membership and shall not be subject to challenge on the day of the primary.

FILE COPY

OCT 2

MICHAEL RODAK, J

In the Supreme Court of the United States

October Term, 1972
No. 71-6316

ANDREW C. GOOSBY et al.,
Petitioners

v.

MAURICE OSSER et al.,
Respondents

BRIEF FOR RESPONDENTS COMMONWEALTH OF PENNSYLVANIA, J. SHANE CREAMER, AND C. DeLORES TUCKER

THOMAS J. ORAVETZ
Deputy Attorney General
EDWARD J. WEINTRAUB
Deputy Attorney General
PETER W. BROWN
Deputy Attorney General
J. SHANE CREAMER
Attorney General
Attorneys for Respondents, Commonwealth of Pennsylvania, J. Shane Creamer and C. DeLores Tucker

Commonwealth of Pennsylvania
Capitol Annex
Harrisburg, Pa. 17120
(717) 787-3229

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

INDEX TO BRIEF

	PAGE
Argument:	
I. Plaintiffs' complaint raises substantial federal questions	1
II. This matter presents a justiciable case or controversy	4

TABLE OF CITATIONS

CASES:

Butler v. Crumlish, 229 F. Supp. 565, 567 (E.D. Pa. 1964)	3
Carrington v. Rash, 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965)	2
Cates v. Henderson, 342 U.S. 804 (1951)	5
Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966)	2
McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969)	1, 2
Metropolitan Railway Receivership, 208 U.S. 90, 28 S. Ct. 219, 52 L. Ed. 403 (1908)	5
Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)	2
Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968)	5

Walling v. Helmerich and Payne, Inc., 323 U.S. 37, 65 S. Ct. 11, 89 L. Ed. 29 (1944) 5

Young v. United States, 315 U.S. 257, 258-259, 62 S. Ct. 510, 86 L. Ed. 832 (1942) 5

CODE:

Section 102(y) of the Pennsylvania Election Code, 25 P.S. §2602(y) 2

TEXT:

Stern & Gressman, Supreme Court Practice, 224-225 (4th ed. 1969) 5

ARGUMENT

I. PLAINTIFFS' COMPLAINT RAISES SUBSTANTIAL FEDERAL QUESTIONS

This case presents the issue of whether persons detained in jail prior to trial or conviction of suspected crimes may constitutionally be deprived of the right to vote. The Court of Appeals below held that in light of *McDonald vs. Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969), this issue does not present a substantial federal question which must be tried before a three-judge federal court.

The Attorney General of the Commonwealth of Pennsylvania, representing himself and the Secretary of the Commonwealth as respondents, must respectfully disagree with the Court of Appeals. This case raises an important question concerning a fundamental constitutional right. The decision of this Court in *McDonald,* supra, is by its very terms a narrow one which in no way disposes of the contentions raised by the petitioners.

Although in *McDonald* this Court rejected the claim of pretrial detainees that they were being unconstitutionally deprived of their right to vote, the Court placed much emphasis in its opinion on the fact that the Illinois statutes "specifically disenfranchise only those who have been convicted and sen-

tenced", 394 U.S. at 808, and that there was nothing in the record to show that the plaintiffs were in fact absolutely prohibited from voting by the state. *Id.* at 807, 808. In addition, the Court found there that the distinctions drawn between those who could vote and those who could not were not drawn on the basis of wealth or race. *Id.* at 807.

Petitioners in this case, by contrast, have alleged and offered to prove that the absolute prohibition of the vote and the distinctions based on wealth and race, absent in *McDonald,* are present here. Petitioners point to Section 102(y) of the Pennsylvania Election Code, 25 P.S. §2602(y), which states that an *"absentee elector" shall not include "any person* committed to or *confined in a penal institution".* (Emphasis added.) They have described in detail their unavailing efforts to secure the means to vote.

The differences between what petitioners allege in this case and what was found in *McDonald* are constitutionally of great moment. On those differences turns the question of whether the "rational purpose" test is applied to the statutes involved, or whether the more exacting "compelling state interest" test is applied. *McDonald,* supra, 394 U.S. at 806-807.* Obviously, the test applied may affect the result.

Respondents reiterate their view that under the compelling state interest test the Pennsylvania Elec-

---

* See also, *Carrington vs. Rash,* 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965); *Harper vs. Virginia Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966); *Reynolds vs. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

tion Code fails to pass constitutional muster. Not only is there no compelling state interest in denying unconvicted prisoners their fundamental right to vote, but respondents cannot conceive of *any* state interest affected or *any* rational purpose served by denying this class of person the ballot.

It cannot be stressed too much that the persons whose rights are involved here are merely incarcerated *pending trial.* They are untried, unconvicted and, therefore, innocent in the eyes of the law. The Commonwealth does, of course, have an interest in either incarcerating suspects or releasing them on bail pending trial. In view of the fundamental presumption of innocence, however, the restrictions on the civil rights of such pretrial detainees should be limited to those necessary to assure their presence at the trial. Denial of the right to vote does not serve that or any other interest. As the Court said in *Butler v. Crumlish,* 229 F. Supp. 565, 567 (E.D. Pa. 1964):

> "The constitutional authority for the State to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself."

It is difficult to imagine, moreover, how allowance of registration or voting by mail by unconvicted persons would disrupt or hamper the administration of jails or the election process. In any event, this is a matter on which evidence would have to be taken and findings of fact made.

It is respectfully submitted, therefore, that petitioners have presented a substantial federal question and should be permitted to present their case on the merits to a three-judge district court.

II. THIS MATTER PRESENTS A JUSTICIABLE CASE OR CONTROVERSY

The District Court, in dismissing the complaint, gave as its sole reason the fact that the Deputy Attorney General representing the Commonwealth conceded that, in the Attorney General's view, the statutes denying the right to vote to unconvicted detainees were unconstitutional under the Fourteenth Amendment to the United States Constitution. In the District Court's view this concession meant there was no case or controversy before it.* The District Court made an egregious error.

The Attorney General and the Secretary of the Commonwealth are not the only defendants in this case. The City Commissioners of Philadelphia, the Voting Registration Supervisor, the Registration Commission, and the Superintendent of Prisons for Philadelphia County are also parties. These parties have contested vigorously the issues raised by petitioners

---

* Contrary to petitioners' argument, respondents do not agree that the Court of Appeals affirmed on this point. In reaching the "substantial federal question" issue, as it did, the Court of Appeals seems to have implicitly passed the threshold question of whether there was a case or controversy and thus jurisdiction.

both in the District Court and on appeal. They have provided adversity of interest, and will sharply define the issues, to the extent they are not already clear.

Even in the absence of the other adverse parties, however, the ruling of the District Court was erroneous. Under *Re Metropolitan Railway Receivership*, 208 U.S. 90, 28 S. Ct. 219, 52 L. Ed. 403 (1908), and *Walling v. Helmerich and Payne, Inc.*, 323 U.S. 37, 65 S. Ct. 11, 89 L. Ed. 29 (1944), the District Court was required to retain jurisdiction to either frame the relief to be granted or to approve a consent order.

Neither the concession made by respondents below nor the concessions made herein on appeal operate to deprive a court of jurisdiction. To the contrary a court is required to review the record and to reach its own determination. In *Young v. United States*, 315 U.S. 257, 258-259, 62 S. Ct. 510, 86 L. Ed. 832 (1942), this Court ruled that:

> The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.

See also *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968); *Cates v. Henderson*, 342 U.S. 804 (1951); Stern & Gressman, *Supreme Court Practice*, 224-225 (4th ed. 1969).

CONCLUSION

For the foregoing reasons, respondents J. Shane Creamer, Attorney General of the Commonwealth of Pennsylvania, and C. DeLores Tucker, Secretary of the Commonwealth of Pennsylvania, respectfully submit that the judgment, opinion and decree of the Court of Appeals should be reversed and the case should be remanded to the District Court for the convening of a three-judge court to hear the merits of plaintiffs' claim.

Respectfully submitted,

THOMAS J. ORAVETZ
Deputy Attorney General
EDWARD J. WEINTRAUB
Deputy Attorney General
PETER W. BROWN
Deputy Attorney General
J. SHANE CREAMER
Attorney General
Attorneys for Respondents Commonwealth of Pennsylvania, J. Shane Creamer and C. DeLores Tucker

LE COP

F I L E
OCT 27
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1971.

No. 6316.

ANDREW C. GOOSBY, et al.,
Petitioners,

vs.

MAURICE OSSER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondents

S. JAY SKLAR,
Assistant City Solicitor,
JOHN MATTIONI,
Deputy City Solicitor,
MARTIN WEINBERG,
City Solicitor,
Attorneys for Municipal Respondents.
1520 Municipal Services Building
Philadelphia, Pa. 19107

Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

TABLE OF CONTENTS

PAGE

Counter-Statement of Questions Presented 1

Counter-Statement of Facts 2

Argument 5

The Federal Courts Should Abstain from Ruling Where Petitioners Have Failed to Exhaust Their State Remedies and Where the Federal Courts Can Avoid an Unnecessary Determination of a Constitutional Question Which Might Impair State Functions 5

Petitioners are Not Entitled to the Convening of a Three-Judge Federal Court When the Substantive Constitutional Challenge of Their Complaint is Wholly Insubstantial 8

Petitioners' Cause of Action Does Not Constitute a Case or Controversy Within the Meaning of Article III of the United States Constitution 13

Conclusion 16

TABLE OF CITATIONS

CASES:

Bailey v. Patterson, 369 U. S. 31 (1962) 8

Dombrowski v. Pfister, 380 U. S. 479 (1965) 7

Harper v. Virginia Board of Elections, 383 U. S. 663 (1966) 10

Hartford Steam Boiler Insp. & Ins. Co. v. Harrison, 301 U. S. 459 (1937) 10

Martin v. Creasy, 360 U. S. 219 (1959) 6

McDonald v. Board of Elections, 394 U. S. 802 (1969) 4, 8, 9, 10, 11, 12, 13, 16

PAGE

Meridan v. Southern Bell Telephone Company, 358 U. S. 639 (1959) 7

Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (1941) 5, 6

Reynolds v. Sims, 377 U. S. 533 (1964) 10

Younger v. Harris, 401 U. S. 37 (1971) 7

STATUTES:

Pennsylvania Permanent Registration Act of March 30, 1937, P. L. 115 as amended, 25 Purdon's Statutes §623-1 et seq. 2, 3, 5

Pennsylvania Election Code Act of June 3, 1937, Art. I §102 as amended, 25 Purdon's Statutes §§2602(2)(w)(x)(y)(z-1), 3146.1(pp) 2, 8, 9

Act of May 29, 1945, P. L. 1108 §1, 36 Purdon's Statutes §2391.1 6

United States Code, Title 28, §2281 .....8, 13

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Should the Federal Courts abstain from ruling where Petitioners have failed to exhaust their State remedies and where the Federal Courts can avoid an unnecessary determination of a constitutional question which might impair State functions?

2. Were Petitioners entitled to the convening of a three-judge court when the substantive constitutional challenge of their complaint was wholly insubstantial?

3. Did petitioners' cause of action constitute a case or controversy within the meaning of Article III of the United States Constitution?

COUNTER-STATEMENT OF FACTS.

Petitioners, who are untried detainees in the Philadelphia Prisons, filed a Complaint challenging the First-Class City Permanent Registration Act of March 30, 1937, P. L. 115, as amended, 25 Purdon's Statutes. Sections 623-1 et seq. and Pennsylvania Election Code, Act of 1937 P. L. 1333, Article 1, sec. 102, as amended by Act of August 13, 1963, P. L. 707, sec. 1, 25 Purdon's Statutes section 2602(w)(12), as unconstitutional on its face and depriving Petitioners and members of the class they represent of the right to register and to vote in Philadelphia County (Appendix p. 9).

On September 8, 1971, a law clerk on the staff of Community Legal Services inquired of Jack Welsh, Voting Registration Supervisor for the City of Philadelphia, whether he (Welsh) could send registrars to Holmesburg Prison for the purpose of registering untried detainees or to allow registration of these detainees by mail. The law clerk did not submit the names of such detainees nor did he state that he was inquiring on behalf of any particular detainee. Mr. Welsh stated that under the Pennsylvania Election Code he could not send registrars to the prison as registration must be held at a place accessible to the public. Nor were the detainees permitted to register by way of absentee registration since they did not qualify under the Registration Act as absentee registrants. On September 13, 1971, at 10:12 P. M., which was one hour and forty-eight minutes prior to the closing of registration period, Ann Torregrossa, Esq., requested Edward G. Mekel, Deputy Registration Commissioner for the City of Philadelphia, to send registrars to the county prisons to register untried detainees. This request was refused and thereupon Mr. Mekel was presented with affidavits to register seven detainees. Mr. Mekel refused to accept this request for registration and stated that unless the seven detainees appeared in person before a registrar or qualified as absentee registrants, he had no authority to register them.

The aforesaid seven detainees, through their attorney, filed an appeal with the City Commissioners in accordance with section 42 of the Registration Act (25 Purdon's Statutes sec. 623-42), on September 13, 1971 at approximately 10:30 P. M. The Chairman of the City Commissioners was out of the country and did not return for official duty until September 22, 1971. A hearing was held on September 28, 1971, after which the appeal was dismissed by the Commissioners. On October 4, 1971 petitioners filed a Petition for a Temporary Restraining Order, and Order to Convene a Three-Judge District Court, and a Preliminary Injunction. These Motions were presented to Judge E. Mac Troutman who held the matter in abeyance until October 6, 1971 for the purpose of giving the Respondents an opportunity to enter into a Stipulation with the Petitioners in order to dispose of this matter and not for the purpose of allowing the Philadelphia Respondents an opportunity to determine whether they would comply with the Stipulation by the Commonwealth of Pennsylvania that the state election laws were unconstitutional as applied to the Petitioners.

On October 6, 1971, Judge Troutman conducted a hearing on Petitioners' Motion for a Temporary Restraining Order. During the hearing the Commonwealth of Pennsylvania, (per J. Shane Creamer, C. Delores Tucker), through their attorneys stated that the registration and the election laws in question were unconstitutional and that the Commonwealth of Pennsylvania had no interest in denying Petitioners the right to register to vote. There was no written opinion issued by the Attorney General of Pennsylvania as to the constitutionality of the Acts in question. Following argument Judge Troutman dismissed the Petitioners' Complaint on the ground that the Court lacked jurisdiction to hear the case and the Attorney General of Pennsylvania said that the laws in question were unconstitutional and therefore there was no adversary proceeding before him. Accordingly the Motions were dismissed as well as the Complaint (Appendix p. 87).

On October 7, 1971, petitioners filed a Notice of Appeal and Motions for Injunction Pending Appeal and for the Convening of a Three-Judge Court. This matter was argued before the Court of Appeals for the Third Circuit on October 8, 1971. After argument the Motion for an Expedited Hearing was granted and the Motion for Temporary Injunction Pending Appeal was denied. The case was set down for oral argument during the week of October 18, 1971.

The panel of the Third Circuit to which the case was assigned notified the parties that it decided to dispense with oral argument on the matter. On October 26, 1971 the panel filed a Per Curiam Opinion affirming the decision of the District Court (Appendix p. 92). The Court of Appeals found that the substantive constitutional challenge of Petitioners' complaint was wholly insubstantial in light of *McDonald v. Board of Elections*, 394 U. S. 802 (1969). Therefore, there was no need for the District Court to convene a three-judge court. The Court of Appeals further held that the statute challenged by Petitioners was clearly constitutional.

On November 9, 1971 Petitioners filed with the Court of Appeals a Petition for Rehearing en Banc which was denied on December 17, 1971 (Appendix p. 93).

On March 10, 1972, Petitioners filed with this Court a Petition for Writ of Certiorari which was granted on June 26, 1972.

ARGUMENT.

THE FEDERAL COURTS SHOULD ABSTAIN FROM RULING, WHERE PETITIONERS HAVE FAILED TO EXHAUST THEIR STATE REMEDIES AND WHERE THE FEDERAL COURTS CAN AVOID AN UNNECESSARY DETERMINATION OF A CONSTITUTIONAL QUESTION WHICH MIGHT IMPAIR STATE FUNCTIONS.

Petitioners initiated legal process in the state courts when they complied with the Registration Act with reference to the Appeal from the refusal to register the seven (7) detainees. They took their appeal and had their hearing before the City Commissioners in accordance with the Registration Act (25 P. S. Section 623-42). The appeal having been denied, the proper procedure under the Registration Act was to file an appeal with the Court of Common Pleas of Philadelphia County.

Petitioners could, if the decision of the Court of Common Pleas was adverse, have perfected an appeal to the Supreme Court of Pennsylvania which under the circumstances of this case could have been requested to hear the matter as an expedited appeal. The Petitioners, therefore, had an adequate remedy at law and their rights would have been fully protected by the Pennsylvania State Courts.

The circumstances of this case are such that the Federal Court should abstain from impeding the State officials from exercising their appropriate function because of the "scrupulous regard for the smooth working of the federal judiciary." *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 501 (1941). The abstention doctrine is based upon two well-established principles. By awaiting State action, (1) The Federal constitutional question posed for Federal decision might become unnecessary; and (2) State Courts should be given the first opportunity to interpret

State statutes. *Railroad Commission of Texas v. Pullman*, supra, at 499-501.

In *Martin v. Creasy*, 360 U. S. 219 (1959), plaintiff sued in the United States District Court for the Western District of Pennsylvania and this matter was returned by the District Court to the Pennsylvania Courts to determine if there was an adequate remedy at law in the State Courts. The State Court declared that there was an adequate remedy but the District Court assumed jurisdiction and granted plaintiff's prayer for injunctive relief and a judgment declaring the Pennsylvania Limited Access Highway Act of May 29, 1945, P. L. 1108, Section 1, 36 P. S. Section 2391.1 unconstitutional. Plaintiff had alleged that the enforcement of the statute would deprive him of his property without due process of law, since the statute did not provide compensation for loss of access to highways. This Court stated that it is desirable (1) to avoid unseemly conflict between two sovereignties, (2) to avoid unnecessary impairment of State functions, and (3) to avoid premature determination of constitutional questions. The Court further stated that there was no reason to suppose that the Commonwealth of Pennsylvania would not accord full constitutional scope to the statute in question, and that "If, after all is said and done in the Pennsylvania Courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here" (255).

The Court held that:

> "It must be assumed that the courts of Pennsylvania meant what they said in stating that the plaintiffs will be afforded a procedure through which the full measure of their rights will be preserved. Assuming, however, that there was a basis to support intervention by a court of equity, the District Court should none the less have declined to adjudicate this controversy" (at 224).

Where the State Court's interpretation of the State statute or evaluation of its validity may obviate the need to

consider its validity under the Federal Constitution, the Federal Court should hold its hand lest it render a constitutional decision unnecessarily. *Meridian v. Southern Bell Telephone Co.*, 358 U. S. 639, 641 (1959).

The case of *Younger v. Harris*, 401 U. S. 37 (1971), dispelled any doubts about the viability of the abstention doctrine which may have been raised by *Dombrowski v. Pfister*, 380 U. S. 479 (1965) and its genre. This Court in *Younger* held that the possible unconstitutionality of a State statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it. It was further stated:

> "The precise reasons for this long standing public policy against Federal Court interference with the State Court proceedings have never been specifically identified, but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that a court of equity should not act . . . when the moving party has an adequate remedy at law. . . ."

In this case, Petitioners initiated these proceedings in the State judicial system. The Registration Act provides machinery to have the issues determined by a State Court. Petitioners had adequate remedies at law without resorting to the federal judiciary. The question presented to this Court for determination involves the constitutionality of a State statute, which statute has not been ruled upon by the Supreme Court of Pennsylvania. There is no allegation of bad faith enforcement of the statute and the oral Opinion of the Attorney General of Pennsylvania makes it obvious that the State judiciary will accord full constitutional protection to the Petitioners. As Judge Troutman pointed out in his Opinion, we have a question which could be resolved by way of State action.

If petitioners are denied the right to vote improperly they have an adequate remedy at law which should be pursued in the proper forum.

THE PETITIONERS ARE NOT ENTITLED TO THE CONVENING OF A THREE-JUDGE FEDERAL COURT WHEN THE SUBSTANTIVE CONSTITUTIONAL CHALLENGE OF THEIR COMPLAINT IS WHOLLY INSUBSTANTIAL.

A Three-Judge Federal Court will not be convened pursuant to 28 U. S. Code Section 2281, when the claim of unconstitutionality is, "wholly insubstantial, legally speaking non-existent", or where "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." *Bailey v. Patterson*, 369 U. S. 31, 33 (1962). In its Opinion the Court of Appeals for the Third Circuit held that the substantive constitutional challenge of Petitioner's Complaint was wholly insubstantial in view of the decision of this Court in *McDonald v. Board of Elections*, 394 U. S. 802 (1969). The decision in the *McDonald* case clearly forecloses the constitutional question raised by Petitioners and leaves no room for the inference that the constitutional challenge raised by Petitioners can be the subject of controversy or the basis for the convening of a Three-Judge Federal Court.

Petitioners are laboring under the misapprehension that the Pennsylvania Election Code prohibits or denies to them the right to vote. If the Petitioners were able to visit the polling place in their residence district they would be entitled to vote in the same manner as other electors.

The Pennsylvania Election Code, Act of June 3, 1937, P. L. 1333, Article I, Section 102 as amended by the Act of August 13, 1963 Public Law Section 707 Section 1, 25 P. S. 2602(w)(12), 3146.1(pp) extends the privilege of voting to certain absentee electors. The Code provides that qualified electors in the following classes are eligible to receive absentee voting ballots. These classes are: (1) members of the military service and their spouses, (2) members of the merchant marines of the United States absent from the state or county and their spouses, (3) members of a re-

ligious or welfare group officially attached to the armed forces absent from the state or county and their spouses, (4) civilian employees of the United States outside the county and their spouses, (5) qualified war veteran electors bedridden or hospitalized due to illness or physical disability absent from the state or county, (6) any qualified elector who expects to be or is absent from the state because of duties occupational or business, (7) any qualified elector who is unable to attend his polling place because of illness or physical disability, (8) any spouse accompanying a person employed in the service of the Commonwealth of Pennsylvania or Federal Government in the United States in the event his duties, profession or occupation require him to be absent from the Commonwealth or his county of residence (25 P. S. 3146.1).

The above classes do not include untried detainees and, as a matter of fact, the Election Code setting up these classes states,

> Qualified absentee electors shall in no wise be construed to include persons confined in a penal institution or mental institution (25 P. S. §2602(w)(12)).

The claim raised by the appellants in *McDonald v. Board of Electors*, supra, is virtually identical with the claim raised by the Petitioners herein. In *McDonald*, the appellants and the class they represented were untried detainees awaiting trial in Cook County Jail. They were registered to vote at the time they applied for absentee ballots. They were refused absentee ballots because they did not come within the class for whom provisions for absentee voting had been made by the Illinois Legislature. Illinois had provided four classes of persons eligible for absentee voting ballots. None of these four classes specifically prohibited detainees such as the appellants in *McDonald* from obtaining absentee voting ballots. Since the Illinois statute did not include detainees in the eligible class, qualified to receive absentee ballots, the result was to exclude detainees

from obtaining such ballot. The Pennsylvania Election Code previously referred to specifically excludes detainees from obtaining absentee ballots. The municipal respondents submit that this constitutes a distinction without a difference. The issue clearly remains the same in both cases that detainees are not eligible for absentee voting ballots under the applicable state law. In *McDonald*, it was decided that this lack of providing for absentee ballots for detainees did not violate any of their constitutional rights. The same applies to the Pennsylvania Election Code provisions which specifically exclude detainees. There is no violation of any constitutional rights in so refraining from giving to them the opportunity to obtain absentee ballots. It is as this Court said in *McDonald* "it is not the right to vote that is at stake but a claimed right to receive absentee ballots" (p. 807).

Absentee voting statutes have been consistently construed as a privilege extending to electors and not an absolute right. As long as the statutes are not violative of the Equal Protection Clause and guarantee that all persons be treated alike under like circumstances or conditions, both in the privileges conferred and the liabilities imposed, there is no constitutional violation. *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U. S. 459 (1937). Only invidious discrimination is forbidden. *Reynolds v. Sims*, 377 U. S. 533 (1964), *Harper v. Virginia State Board of Elections*, 383 U. S. 663 (1966). The threshold question this Court faced in *McDonald* was:

> "How stringent a standard he used in evaluating the classification made (by the Illinois Absentee Ballot provisions) and whether the distinction must be justified by a compelling state interest . . ." page 806.

A stringent compelling state interest test must be met in either of two situations, (1) the petitioner's right to vote was infringed, *Reynolds v. Sims*, supra, or (2) the statutory classification was drawn on the basis of wealth and race. *Harper v. Virginia*, supra.

Neither of these two conditions are present in this case. The Petitioners' right to vote is not infringed. The key question is merely whether they are entitled to an absentee ballot under valid state law. Furthermore, the classification is not drawn on the basis of wealth or race. It is clear as this Court said in *McDonald* that the statutory classifications must be upheld if they bear reasonable relationship to the legitimate state end. 394 U. S. at 808-809. The Pennsylvania legislature has legitimately sought to limit the privilege of absentee ballots so as not to provide absentee ballots to those incarcerated in the state prisons. While the detainees are clothed with the presumption of innocence they are nevertheless incarcerated because a committing magistrate has found a prima facie case to exist based on the charges brought against him and the amount of bail that has been set has either been not met or is too high for any person of reasonable means to meet at all. These two factors are certainly legitimate ends of the criminal justice system and the fact that they exist should not alter the manner in which the Pennsylvania Legislature can denominate who is and who is not entitled to an absentee voting ballot.

Petitioners set forth three distinctions that they claim exist between this case and the *McDonald* case. The first distinction is that Petitioners, unlike *McDonald* appellants are absolutely denied their right to vote. Municipal respondent submits that this is just not the case. Petitioners are precluded from obtaining an absentee voting ballot, there is no denial of their right to vote. They are in the same situation as the inmates in the *McDonald* case who also could not obtain an absentee ballot and therefore could not vote. The fact that the pretrial detainees could not or were not permitted by statute to post bail to effect a release from prison is not at all an issue in this case. This case revolves solely and only around the validity of the Pennsylvania Election Code provisions for absentee voting ballots. Any questions as to the rights to bail is not an

issue and cannot be an issue and is not determinative of this case. If the Petitioners seek to challenge the bail system as unconstitutional, that is their prerogative. However, such a challenge has not been made at this case.

The second distinction Petitioners raise is that the Pennsylvania absentee voting ballot, unlike the challenged Illinois Statute in *McDonald* draws lines on the basis of wealth and race. There is no distinction made in either statute, the Illinois or the Pennsylvania, on the basis of wealth or race. The absentee ballot provisions of the Pennsylvania Election Code apply to all inmates in prisons regardless of wealth or race. The fact that certain inmates may not be able to raise bail or that many of these inmates are of one race or another is irrelevant to the enforcement and application of the Election Code. The fact that the Illinois statute does not specifically exclude but rather does not include the detainees where the Pennsylvania statute specifically excludes them is irrelevant and cannot sustain the allegation that any distinction between the two cases exists at all. Petitioners' assertion that the Pennsylvania Statute discriminates on the basis of wealth and race is sophistry of the highest order.

The Pennsylvania Statute draws the same line as the Illinois Statute did: that is, certain classes of electors are eligible to vote by absentee ballot and all others white and black, poor and affluent who are incarcerated in prison cannot vote by absentee ballot.

Petitioners' third distinction that even if the classification drawn by the Pennsylvania Absentee Voting Statute are not tested by the compelling state interest test, there are significant differences between the *McDonald* case and the Petitioners' case raise a substantial constitutional question as to whether the Pennsylvania Statute invidiously discriminates against Petitioners, is not meritorious.

As aforementioned, there is no difference between the Illinois statute, which was subject to interpretation by the Court in *McDonald,* supra, and the Pennsylvania Election

Code provisions, which preclude detainees from obtaining absentee voting ballots. Therefore, the decision of this Court in *McDonald* is applicable to Petitioners' claim in this matter. There is no authority under 28 U. S. C. 2281 for the convening of a Three-Judge Federal Court.

PETITIONERS' CAUSE OF ACTION DOES NOT CONSTITUTE A CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III OF THE UNITED STATES CONSTITUTION.

It is readily apparent that no case or controversy exists between the parties so as to give jurisdiction to a Three-Judge Federal Court. The effect of Judge Troutman's Order dismissing Petitioners' Complaint was to return this matter to the Pennsylvania State Courts for determination. Petitioners make much of the fact that the Attorney General without the benefit of a written legal opinion orally stated that the Registration Act and the Election Code pertaining to absentee ballots, as same applies to the Petitioners, is unconstitutional. Petitioners sought to have the District Court declare these acts unconstitutional. Since the Attorney General has stated that Acts involved are indeed unconstitutional, there was no controversy before the District Court and therefore there was no issue for that Court to determine. This, in effect, removed the matter to the State Court to determine whether or not the local election officials, municipal respondents herein, are duty bound to follow the oral opinion of the Attorney General, and if they are so bound, it then remains the duty of the Attorney General to establish procedures as to the registration and absentee ballot voting under the "unconstitutional" sections of the Act involved. The District Court refused due to lack of expertise to set up standards and procedures which might be considered reasonable under the circumstances of this case.

The reasons given by the District Court for this are valid and should guide this Court in sustaining the decision of the Third Circuit Court of Appeals. The District Court said:

> "Now in effect we are being asked absent an opinion by the Attorney General, absent his recommendation as to proper procedures, absent his expertise and the expertise of those upon whom he may properly call, to declare this act unconstitutional and to establish our own procedures as to registration. Obviously, this Court is not endowed with the expertise to establish procedures which might be considered reasonable under the peculiar circumstances of this case, which might not be considered burdensome. Indeed even with the benefit of testimony, it is doubtful that we fairly and adequately develop a plan of registration on short notice demanded by parties" (App. pp. 83-84).

The District Court correctly thought that this matter was indeed within the purview of the State Courts and the Attorney General's Office, once the Attorney General has conceded that the Acts involved are unconstitutional. All that remains is that proper procedures be adopted by the State through the Attorney General's Office to comply with their determination that the Acts are unconstitutional and that Petitioners herein are entitled to the right to have absentee voting ballots.

The District Court further stated:

> "As competent and capable counsel in this case so well know, a controversy presented to the Court must be one that is appropriate for judicial determination. It must touch the legal relation of the parties having adverse legal interest. But there are no adverse legal interests as between the Commonwealth and the Plaintiffs. The adverse legal interests existing, if they do exist, as between the Plaintiffs and the Defendant Commissioners (the Municipal Respondents herein), who even to this day have not had the opportunity to react to a proper opinion by the Attorney General

such as was submitted in the student registration case, the business of the federal courts are limited to questions in an adversary context and in a form historically viewed as capable of resolution through the judicial process" . . . (Appendix p. 84).

"The Courts do not render advisory opinions. They require the presentation of concrete legal issues in actual cases. In view of the concessions made by the Attorney General, it is our belief that a substantial controversy between the parties having adverse legal interest does not exist" (App. p. 85).

The essential issue the Petitioners herein have raised is the constitutionality of certain provisions of the Pennsylvania Election Code covering absentee voting ballots. The Attorney General has conceded that these provisions are indeed unconstitutional. Nevertheless, the Attorney General has not since the beginning of this litigation issued a formal opinion as to the unconstitutionality of the statute. Whether or not the municipal respondents are bound by any opinion of the Attorney General as to the unconstitutionality of the statutes involved is not an issue here since no opinion of the Attorney General has been so issued. Nevertheless, the Attorney General could issue an Opinion and could institute procedures to insure that Petitioners herein and those of them like situate can indeed have absentee voting ballots. The only relief that the Petitioners have asked this Court to do is to send this matter back to a Three-Judge Federal Court for determination of the issues involved. If the Court does so, a Three-Judge Court will sit and, if Petitioners prevail, confirm the decision of the Attorney General that these acts are unconstitutional. This, municipal respondents submit, is not an appropriate role for a Three-Judge Federal Court to take. Once these acts are declared unconstitutional by Court action new acts will have to be instituted or new procedures to insure that Petitioners receive absentee voting ballots.

There clearly is no case or controversy between the parties in this matter nor is there adversity of interest between Petitioners and all defendants so as to give federal court jurisdiction of this matter. The District Court was correct in not convening a Three-Judge Federal Court to hear this case both based on the aforestated argument relative to the decision in *McDonald v. Board of Elections*, supra, and the fact that there is indeed no case or controversy between these parties since the main defendant, the Commonwealth of Pennsylvania, through its Attorney General's Office has conceded that the acts involved are unconstitutional. It is the burden of the state courts and the Attorney General and the state legislature to now remedy this situation to provide for a constitutional manner in which the Petitioners herein can obtain absentee voting ballots.

CONCLUSION.

THEREFORE for the foregoing reasons, the judgment, opinion and order of the Court of Appeals be affirmed because if the *McDonald*, supra, decision is proper the reversal of the judgment, opinion and order of the Court below would result in the law prohibiting directly what it has allowed indirectly.

Respectfully submitted,

S. JAY SKLAR,
Assistant City Solicitor,
JOHN MATTIONI,
Deputy City Solicitor,
MARTIN WEINBERG,
City Solicitor.

COPY

Supreme Court
FILED
NOV 30
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,
Petitioners,

v.

MAURICE OSSER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ANN S. TORREGROSSA
JOSEPH A. TORREGROSSA
ELLIOT B. PLATT
JONATHAN M. STEIN
LAURENCE M. LAVIN
313 South Juniper Street
Philadelphia, Pennsylvania 19107
Attorneys for Petitioners

Washington, D.C. • THIEL PRESS • (202) 393-0625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,

Petitioners,

v.

MAURICE OSSER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Petitioners herewith make the following Reply to the Brief for Municipal Respondents filed in this matter.

I. THE ISSUE OF ABSTENTION IS NOT BEFORE THIS COURT

Municipal Respondents' chief contention is that petitioners' complaint was properly dismissed because the District Court should have abstained from hearing

petitioners' case. Respondents' argument is, however, inappropriately made because the issue of abstention is not before this Court. This is so for two reasons.

First, abstention is not in issue until the jurisdictional issues of the case are resolved. In order to reach the issue of abstention, it must be found in the first instance that a federal court has jurisdiction to hear the case. This preliminary resolution of the jurisdictional issue is important because where a federal court abstains it retains jurisdiction and does not dismiss the case. In the case at bar, the question of abstention was not before either the District Court or the Court of Appeals, nor was it reached or even raised by those Courts. The District Court dismissed petitioners' complaint for lack of jurisdiction and the Court of Appeals affirmed the dismissal on the ground that petitioners' case failed to present substantial constitutional issues. Since both Courts found that petitioners' case did not meet even the threshhold jurisdictional requirements, abstention is clearly not in issue until the jurisdictional issue is resolved before this Court.

Second, it is clear under *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) that, in cases where application has been made for a three-judge court, the issue of abstention is not properly raised until the application for a three-judge court is decided. In *Idlewild*, the Court held that in three-judge court cases it was improper for a single judge to abstain and that the question of abstention was only for the three-judge court. Thus, in the case at bar, until the three-judge court issue is decided by this Court, abstention is not in issue.

For the foregoing reasons, therefore, it is apparent that the jurisdictional and three-judge court issues are the only

issues before the Court and these issues must be resolved before abstention may be raised in this case. Should the Court reverse the Court of Appeals and remand the case, the issue of abstention may be raised by Respondents below.

II. THE SUBSTANTIVE CONSTITUTIONAL CHALLENGE OF PETITIONERS' COMPLAINT IS NOT WHOLLY INSUBSTANTIAL

Municipal Respondents contend that petitioners' case involves merely a request for absentee ballot privileges and is, therefore, identical with the *McDonald* case. Respondents ignore, however, the allegations of petitioners' complaint and the entire thrust of petitioners' Brief that they not only sought to vote by absentee ballot but also in person by various means. Respondents candidly admit that the laws of the Commonwealth prohibit petitioners from voting by absentee means, and do not deny that petitioners' numerous attempts to vote in person were refused both by the Commonwealth and Municipal Respondents. Thus, for this reason and others, which are set forth more fully in the Brief for the Petitioners at pp. 12-25, the case at bar is clearly distinguishable from *McDonald*.

In addition, it should be noted that in a case identical to the petitioners' case brought just last month in the Northern District of Ohio, not only was a three-judge Court convened but the Court ruled in favor of the pre-trial detainees and ordered that paper ballots be provided to them. *Love v. Hughes*, No. C-72-1081, Memorandum Opinion and Order filed October 27, 1972.

III. PETITIONERS' CASE DOES CONSTITUTE A CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III OF THE UNITED STATES CONSTITUTION

Municipal Respondents' contend that the District Court properly found that petitioners' case does not constitute a case or controversy because the Attorney General of Pennsylvania has failed to issue a formal Opinion on the matter. Quite to the contrary, however, it is the Attorney General's actions, both in failing to issue any Opinion and in refusing petitioners' numerous requests to permit petitioners to register and vote, that results in the absolute denial of petitioners' right to vote. Moreover, even if such an Opinion were issued, the Municipal Respondents have stated that the Opinion is not binding on them and that they may administer the election laws independently of the Attorney General. As noted in the Brief for the Petitioners, at page 32, the absence of an Attorney General's Opinion does not make petitioners' plight any less of a deprivation of constitutional rights.

IV. CONCLUSION

For the reasons set forth herein and for the reasons set forth in the Brief for the Petitioners, the judgment, opinion and order of the Court of Appeals should be reversed and the case remanded to that Court with instructions to remand to the District Court for the empanelling of a three-judge Court.

ANN S. TORREGROSSA
JOSEPH A. TORREGROSSA
ELLIOT B. PLATT
JONATHAN M. STEIN
LAURENCE M. LAVIN
313 South Juniper Street
Philadelphia, Pennsylvania 19107

Attorneys for Petitioners

November 24, 1972

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GOOSBY ET AL. *v.* OSSER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-6316. Argued December 6-7, 1972—
Decided January 17, 1973

Philadelphia County prisoners unable to make bail or being held on nonbailable offenses brought this class action, asserting the unconstitutionality of Pennsylvania Election Code provisions denying them the right to vote. When the Commonwealth (but not the municipal) officials who were named as defendants conceded the Code provisions' unconstitutionality, the District Judge (deeming the Commonwealth officials the principal defendants) ruled the case nonjusticiable as not involving an Art. III case or controversy, and dismissed the complaint. The Court of Appeals, though differing as to justiciability, affirmed on the ground that petitioners' constitutional claims were wholly insubstantial under *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U. S. 31, and ruled that a three-judge district court was therefore not required under 28 U. S. C. § 2281. *Held:*

1. The Commonwealth officials' concession did not foreclose the existence of an Art. III case or controversy since the municipal officials continue to assert the right to enforce the challenged Code provisions. Pp. 4-5.

2. *McDonald*, *supra*, unlike the situation alleged here, did not deal with an absolute prohibition against voting by the prisoners there involved, and that decision does not "foreclose the subject" of petitioners' challenge to the Pennsylvania statutory scheme. The case must therefore be heard by a three-judge district court. Pp. 5-10.

452 F. 2d 39, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-6316

Andrew C. Goosby et al., Petitioners, v. Maurice Osser et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 17, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question is whether 28 U. S. C. § 2281 [1] required the convening of a three-judge court in the District Court for the Eastern District of Pennsylvania to hear this case. It is a class action brought by and on behalf of persons awaiting trial and confined in Philadelphia County prisons because either unable to afford bail or because charged with nonbailable offenses. The complaint alleges that provisions of the Pennsylvania Election Code, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, absolutely deny petitioners' class the right to vote in that they neither permit members of the class to leave

[1] 28 U. S. C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

prison to register and vote, nor provide facilities for the purpose at the prisons, and in that they expressly prohibit persons "confined in penal institutions" from voting by absentee ballot.[2] The complaint names as defendants two Commonwealth officials, the Attorney General and Secretary of State of Pennsylvania, and certain municipal officials of the County and City of Philadelphia: the City Commissioners of Philadelphia who constitute the Board of Elections and Registration Commission of the City and County of Philadelphia, the Voting Registration Supervisor for the City and County, and the Superintendent of Prisons for the County.

On oral argument before a single judge on petitioners' motion for a temporary restraining order, the Commonwealth officials appeared by a Deputy Attorney General who conceded that the challenged provisions of the Election Code, as applied to petitioners' class, were unconstitutional under the Fourteenth Amendment. The municipal officials, on the other hand, vigorously defended the constitutionality of the provisions as so applied. The single judge deemed the contrary view of the municipal officials to be irrelevant, as he regarded the Commonwealth officials to be the "principal defendants." See n. 3 *infra*. He therefore ruled that the concession on behalf of the Commonwealth officials meant there was no case or controversy before the court as required by Art.

[2] Pa. Stat. Ann. Tit. 25, § 623–1 *et seq.*; § 2602 (w)(12) (1972 Supp.). Several elections, including the 1972 presidential election, have been held since this action was filed, but this does not render the case moot. See *Moore* v. *Ogilvie*, 394 U. S. 814 (1969). Similarly, the case is not rendered moot because some of the named petitioners have lost their status as class members by being released on bail, discharged, acquitted, or convicted. See *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U. S. 802, 803 n. 1 (1969); *Washington* v. *Lee*, 390 U. S. 333 (1968), aff'g 263 F. Supp. 327 (MD Ala. 1966).

III of the Constitution, and dismissed the complaint.[3] On petitioners' appeal the Court of Appeals for the Third Circuit affirmed. 452 F. 2d 39 (1971). We do not however read the *per curiam* opinion of the Court of Appeals as resting the affirmance on agreement with the single judge that the concession of the Commonwealth officials meant there was no case or controversy before the court. Rather we read the *per curiam* opinion as either implying disagreement with the single judge on that question, or as at least assuming that a case or controversy existed, for the opinion states that, in the view of the Court of Appeals, petitioners' constitutional claims were wholly insubstantial under *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802 (1969), in which circumstance, the Court of Appeals held, *Bailey* v. *Patterson*, 369 U. S. 31 (1962), was authority that 28 U. S. C. § 2281 did not require the assembly of a three-judge court and that dismissal by the single judge was therefore proper, 452 F. 2d 40. A petition for rehearing *en banc*

---

[3] The unpublished transcript of the oral opinion of the single judge reads in pertinent part as follows:

"It has been stated that no Federal Court has jurisdiction to pronounce any statute, either of the State or of the United States void because irreconcilable with the Constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies.

"Now, in the instant case the Attorney General, as the chief legal officer of the Commonwealth, obviously represents, as counsel have stated in their arguments this morning, the 'principal' Defendant or Defendants. The position taken by the remaining Defendants seems to be the result of the fact that the Attorney General has not, in accordance with his past practice, rendered an opinion together with suggested procedures, plans, etc., covering the subject matter of the opinion.

"It is, therefore, our conclusion that in the posture of the case as it presently exists that there is no controversy in the sense in which that term is used by the Courts, and we find ourselves compelled to, therefore, dismiss the complaint. It is so ordered." App., at 85.

was denied, three judges dissenting. We granted certiorari, 408 U. S. 922 (1972). We reverse the judgment of the Court of Appeals and remand with direction to enter an appropriate order pursuant to 28 U. S. C. § 2281 for the convening of a three-judge court to hear this case.

I

The single judge clearly erred in holding that the concession of the Commonwealth officials foreclosed the existence of a case or controversy. All parties are in accord that Pennsylvania law did not oblige the municipal officials to defer to the concession of the Commonwealth officials, or otherwise give the Commonwealth officials a special status as "principal defendants."[4] Indeed, the brief filed in this Court by the Commonwealth officials forthrightly argues that "[t]he District Court made an egregious error. The Attorney General and the Secretary of the Commonwealth are not the only defendants in this case. The City Commissioners of Philadelphia, the Voting Registration Supervisor, the Registration Commission and the Superintendent of Prisons for Philadelphia County are also parties. These parties have contested vigorously the issues raised by petitioners both in the District Court and on appeal. They have provided adversity of interest, and will sharply define the issues to the extent they are not already clear." Brief for Respondents Attorney General and Secretary of State, at 4–5.[5]

[4] Thus, this is not a situation in which a State confesses error and represents that error will be corrected without need for further court action. See, *e. g.*, *Titmus* v. *Tinsley*, 370 U. S. 964 (1962); *McKissick* v. *Durham City Board of Education*, 176 F. Supp. 3 (MDNC 1959); *Jeffers* v. *Whitley*, 197 F. Supp. 84 (MDNC 1961); *Kelly* v. *Board of Education*, 139 F. Supp. 578 (MD Tenn. 1955).

[5] We also read respondents' brief as rejecting the view of the single judge that the municipal officials must defer to the commonwealth officials concession pending the issuance of a formal opinion of the

Thus, there is satisfied the requisite of Art. III that "The constitutional question . . . be presented in the context of a specific live grievance." *Golden* v. *Zwickler*, 394 U. S. 103, 110 (1969). As between petitioners and the municipal officials the District Court was "called upon to adjudge the legal rights of litigants in actual controversies," *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners*, 113 U. S. 33, 39 (1885), and ". . . the interests of [petitioners' class] required the use of . . . judicial authority for [petitioners'] protection against actual interference." *United Public Workers of America* v. *Mitchell*, 330 U. S. 75, 90 (1947). Since the municipal officials persist in their asserted right to enforce the challenged provisions of the Election Code there is a "real and substantial controversy" "touching the legal relations of parties having adverse legal interests," *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937), in which circumstance the concession of the Commonwealth officials could not have the effect of dissipating the existence of a case or controversy. Cf. *Re Metropolitan Railway Receivership*, 208 U. S. 90, 107–108 (1908).

II

The Court of Appeals also erred. We disagree with its holding that *McDonald* v. *Board of Election Commissioners*, *supra*, rendered petitioners' constitutional claims wholly insubstantial.

Section 28 U. S. C. § 2281 does not require the convening of a three-judge court when the constitutional

---

Attorney General on the question of the constitutionality of the statutes.

Insofar as the single judge may have rested his finding of the absence of a case or controversy on the alleged difficulty of formulating a remedy he also erred. See *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965); *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955).

attack upon the state statutes is insubstantial. "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962), "wholly insubstantial," *ibid*, "obviously frivolous," *Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285, 288 (1910), "obviously without merit," *Ex parte Poresky*, 290 U. S. 30, 32 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex parte Poresky, supra*, 290 U. S., at 32; see also *Levering and Garrigues Co.* v. *Morrin, supra*, 289 U. S. 103, 105 (1933); *Hannis Distilling Co.* v. *Baltimore, supra*, 216 U. S., at 288; *McGilvra* v. *Ross*, 215 U. S. 70, 80 (1909). Under this test it is clear that *McDonald* is not a prior decision of this Court that "foreclose[s] the subject" of petitioners' constitutional attack upon the Pennsylvania statutory scheme: it is demonstrably not a decision that "leave[s] no room for the inference that the question sought to be raised [by petitioners] can be the subject of controversy."

In *McDonald*, appellants were a class of pretrial detainees in Cook County, Illinois, already registered to vote who sought to vote only by absentee ballot. Their timely application to the Cook County Board of Elec-

tion Commissioners for an absentee ballot was denied on the ground that pretrial detainees were not included among those persons specifically permitted by the Illinois Election Code to vote by absentee ballot. Appellants brought suit alleging that in that circumstance the Illinois Election Code denied them equal protection of the laws, particularly as the Code provided absentee ballots for those "medically incapacitated," and for pretrial detainees who were residents of Cook County but incarcerated outside of Cook County.[6]

The threshold question presented in *McDonald* was "how stringent a standard to use in evaluating the classifications made [by the Illinois absentee ballot provisions] and whether the distinctions must be justified by a compelling state interest . . . ." 394 U. S., at 806. In resolving this question, the Court analyzed the Illinois scheme in light of our decisions that required the application of the more stringent compelling state interest test when either a fundamental right, such as the right to vote, was allegedly infringed, *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Carrington* v. *Rash*, 380 U. S. 89 (1965), or when the statutory classifications were drawn on the basis of suspect criteria, such as wealth or race, *Harper* v. *Virginia Board of Elections*, *supra*; *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964); *Douglas* v. *California*, 372 U. S. 353 (1963). 394 U. S., at 807. Our analysis led us to conclude that neither situation was presented by the Illinois absentee voting

[6] The Illinois absentee voting statute, Ill. Rev. Stat., c. 46, §§ 19–1 to 19–3, made absentee voting available to four classes of persons: (1) those who were absent from their county of residence for any reason; (2) those who were "physically incapacitated"; (3) those whose observance of a religious holiday prevented attendance at the polls; and (4) those who served as poll watchers in precincts other than their own on election day. See 394 U. S., at 803–804.

provisions. We held that "the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race," 394 U. S., at 806, and, with respect to the alleged infringement of appellants' right to vote that:

> "[T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois' Election Code so operates as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants. [Citation omitted.] *Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.*" *Id.*, at 807–808. (Emphasis supplied.)

For all that appeared, Illinois might make the franchise available by other means:

> "Appellants agree that the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.*, at 808, n. 6.

Thus, "[s]ince there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State . . ." *id.*, at 808 n. 7, we concluded that the Illinois absentee ballot provisions were to be tested by the "more traditional standards for evaluating . . . equal protection claims," *id.*, at 808, and that under those standards the provisions could not be said to be arbitrary or unreasonable particularly since "there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise." *Id.*, at 809.

Petitioners' constitutional challenges to the Pennsylvania scheme are in sharp contrast. Petitioners allege[7] that, unlike the appellants in *McDonald*, the Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes "persons confined in a penal institution" from voting by absentee ballot, Pa. Stat. Ann. Tit. 25, § 2602 (w) (12) (1972 Supp.), and because requests by members of petitioners' class to register and to vote either by absentee ballot, or by personal or proxy appearance at polling places outside the prison, or at polling booths and registration facilities set up at the prisons, or generally by any means satisfactory to the election officials, had been de-

[7] "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint." *Ex parte Poresky*, 290 U. S. 30, 32 (1933). In the present procedural posture of petitioners' case, the allegations of their complaint must be deemed to be true. *Boddie* v. *Connecticut*, 401 U. S. 371, 373 (1971); *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960). In addition to the allegations that they are absolutely prohibited from voting, petitioners allege that the Pennsylvania statute creates classifications based on wealth and race, that the denial of the right to vote is an impermissible consequence of pretrial detention in violation of due process of law, and that the Pennsylvania statute's specific exclusion of pretrial detainees from the definition of a "qualified absentee voter" is unconstitutional even under the less stringent rational relationship test applied in *McDonald*.

nied. Thus, petitioners' complaint alleges a situation which *McDonald* itself suggested might make a difference case.

This is not to say, of course, that petitioners are as a matter of law entitled to the relief sought. We neither decide nor intimate any view upon the merits. It suffices that we hold that *McDonald* does not "foreclose the subject" of petitioners' challenge to the Pennsylvania statutory scheme. The significant differences between that scheme and the Illinois scheme leave ample "room for the inference that the question sought to be raised [by petitioners] can be the subject of controversy."

We therefore conclude that this case must be "heard and determined by a district court of three judges . . . ." 28 U. S. C. § 2281.[8] The judgment of the Court of Appeals is therefore reversed and the case is remanded with direction to enter an appropriate order pursuant to that section for the convening of a three-judge court to hear and determine the merits of petitioners' constitutional claims, see *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 153 (1963); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962); *Borden Co.* v. *Liddy*, 309 F. 2d 871, 876, cert. denied, 372 U. S. 953 (1963); *Rios & Co.* v. *Hich*, 99 F. 2d 553, 555; see also Wright, The Law of Federal Courts 190–191 (2d ed. 1970), or, if deemed appropriate, to abstain from such determination pending state court proceedings. See *Lake Carriers* v. *MacMullan*, 406 U. S. 498, 509–513 (1972).

It is so ordered.

---

[8] The *per curiam* opinion of the Court of Appeals states: "We have carefully considered each of the contentions raised by the [petitioners] and find them to be without merit." 452 F. 2d —. In view of the result we reach, the Court of Appeals was without jurisdiction to render this holding insofar as it implies an adjudication of the merits of petitioners' constitutional contentions. *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930). Wright, The Law of Federal Courts 193 (2d ed. 1970).